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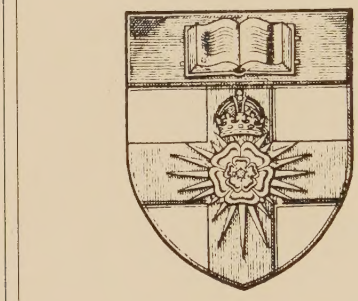

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THE ALL ENGLAND LAW REPORTS REPRINT

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REVISED AND ANNOTATED

1558-1774

Editor
G. F. L. BRIDGMAN, ESQ., O.B.E.
of the Middle Temple, Barrister-at-Law

Revising Editor
MISS M. R. PLUMMER
of Lincoln's Inn, Barrister-at- Law

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of Gray's Inn, Barrister-at-Law

MISS PHILIPPA PRICE
of Gray's Inn, Barrister-at-Law

G. A. KIDNER, ESQ.
of the Middle Temple, Barrister-at-Law

MISS M. G. THOMAS
of Gray's Inn, Barrister-at-Law

DAVID IWI, ESQ.
of Gray's Inn, Barrister-at-Law

THE REPORTERS

The cases printed in this volume were originally reported by members of the Bar whose names are given in the Reports from which the cases have been selected.

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THE
ALL ENGLAND
LAW REPORTS
REPRINT

COGGS *v.* BERNARD

[Court of Queen's Bench (Sir John Holt, C.J., Gould, Powys and Powell, JJ.), Trinity Term, 1703]

[Reported 2 Ld.Raym. 909; 1 Com. 133; Holt, K.B. 13, 131, 528, 569; 1 Salk. 26; 2 Salk. 522; 3 Salk. 11, 268; 92 E.R. 107]

Bailee—Liability—Six classes of bailment—Depositum—Commodatum—Locatio et conductio—Pawn—Delivery of chattel for carriage or performance of work—Services to goods without reward.

Per Sir John Holt, C.J.: There are six sorts of bailments. The first is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor without reward. This I call a depositum. The bailee is not answerable for loss or damage to the goods in the absence of gross negligence on his part. The second is a commodatum, where a bailor, without recompense, lends a chattel to the bailee for him to use. The bailee is bound to use the strictest care and diligence to keep the goods and restore them to the bailor. The third is locatio et conductio where goods are left with the bailee to be used by him for hire. Here also the bailee is bound to take the utmost care of the goods and to return them when the time of hiring has expired. The fourth is where goods are delivered to another as a pawn. The pawnee must use ordinary care. The fifth is where goods or chattels are delivered to another to be carried or have some work done on them. There the liability of the bailee is as stated infra in the case of carriers. The sixth arises where the bailee is to have no reward for dealing with the goods bailed. If in executing the commission he behaves negligently, an action will lie against him.

Carriage of Goods—Common carrier—Loss or damage to goods—Liability—Responsibility for loss or damage in any event—Exception of act of God and enemies of the Crown—Robbery by irresistible force.

A common, or public, carrier who accepts delivery of goods for carriage for reward is bound to answer for the safety of the goods against all events save acts of God and of the King's enemies, even though he is robbed of the goods by a force which he cannot resist. But a carrier other than a common carrier, although he is to have a reward, is not answerable for any loss or damage to the goods which was not caused or facilitated by his negligence.

Notes. Considered: *Boucher* v. *Lawson* (1736), Lee temp. Hard. 194. Applied: *Elsee* v. *Gatward* (1793), 5 Term Rep. 143; *Gibson* v. *Inglis* (1814), 4 Camp. 72; *R.* v. *Cording* (1832) 1 Nev. & M.K.B. 35. Considered: *Ross* v. *Hill* (1846), 2 C.B. 877. Distinguished: *Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Exch. 30. Considered: *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; *Donald* v. *Suckling* (1866), L.R. 1 Q.B. 585; *Skelton* v. *London and North Western Rail. Co.* (1867), L.R. 2 C.P. 631; *Giblin* v. *McMullen* (1868), L.R. 2 C.P. 317; *Nugent* v. *Smith* (1875), 1 C.P.D. 19; *Bergheim* v. *Great Eastern Rail. Co.* (1878), 3 C.P.D. 221. Applied: *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 28 W.R.

526. Considered: *Banbury* v. *Bank of Montreal*, [1918–19] All E.R.Rep. 1; *Halliwell* v. *Venables*, [1930] All E.R.Rep. 284. Referred to: *Buckmyr* v. *Darnell* (1704), 2 Ld. Raym. 1085; *Robinson* v. *Green* (1723), 1 Stra. 574; *Shelton* v. *Osborn* (1729), 1 Barn.K.B. 260; *Kettle* v. *Bromsall* (1738), Willes, 118; *Charitable Corpn.* v. *Sutton* (1742), 2 Atk. 400; *Hartop* v. *Hoare* (1743), 3 Atk. 44; *Ryall* v. *Rowles* (1750), 1 Ves. Sen. 348; *Pasley* v. *Freeman*, [1775–1802] All E.R.Rep. 31; *Lickbarrow* v. *Mason*, [1775–1802] All E.R.Rep. 1; *Guilliam* v. *Barnett* (1804), 2 Smith, K.B. 155; *Cavenagh* v. *Such* (1815), 1 Price, 328; *Pippin* v. *Sheppard* (1822), 11 Price, 400; *Whitehead* v. *Greetham* (1825), 2 Bing. 464; *Corbett* v. *Packingham* (1827), 6 B. & C. 268; *Gledstone* v. *Hewitt* (1831), 1 Tyr. 445; *M'Kenzie* v. *M'Leod* (1834), 10 Bing 385; *Vaughan v. Menlove*, [1835–42] All E.R.Rep. 156; *Boorman* v. *Brown* (1842), 3 Q.B. 511; *Balfe* v. *West* (1853), 13 C.B. 466; *Dansey* v. *Richardson* (1854), 3 E. & B. 144; *Syred* v. *Carruthers* (1858), E.B. & E. 469; *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Martin* v. *Reid* (1862), 11 C.B.N.S. 730; *Pigot* v. *Cubley* (1864), 15 C.B.N.S. 701; *Swire* v. *Leach*, [1861–73] All E.R.Rep. 768; *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1865), 3 Moo.P.C.C.N.S. 272; *Grill* v. *General Iron Screw Collier Co.* (1866), 12 Jur.N.S. 727; *Readhead* v. *Midland Rail. Co.*, [1861–73] All E.R.Rep. 30 *Liver Alkali Co.* v. *Johnson* (1874), L.R. 9 Exch. 338; *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122; *Harris* v. *Great Western Rail. Co.* (1876), 1 Q.B.D. 515; *Hoare* v. *Great Western Rail. Co.* (1877), De Colyar's County Ct. Cases, 192; *Cutler* v. *North London Rail. Co.* (1887), 56 *L.T.* 639; *The Moorcock*, [1886–90] All E.R.Rep. 530; *Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q.B. 373; *The Winkfield*, [1900–3] All E.R.Rep. 346; *Harris* v. *Perry*, [1903] 2 K.B. 219; *Cheshire* v. *Bailey*, [1904–7] All E.R.Rep. 882; *Clarke* v. *West Ham Corpn.*, [1909] 2 K.B. 858; *Shrimpton* v. *Hertfordshire County Council* (1910), 74 J.P. 305; *Bath* v. *Standard Land Co.*, [1911] 1 Ch. 618; *Attenborough & Son* v. *Solomon*, [1911–13] All E.R.Rep. 155; *Hatton* v. *Car Maintenance Co.* (1914), 110 L.T. 765; *Coldman* v. *Hill*, [1918–19] All E.R.Rep. 434; *The Empress* (1922), 92 L.J.P. 42; *Pratt* v. *Patrick*, [1923] All E.R.Rep. 512; *Karflex, Ltd.* v. *Poole*, [1933] All E.R.Rep. 46; *Bryce* v. *Hornby* (1938), 82 Sol. Jo. 216; *Lister* v. *Romford Ice and Cold Storage Co.*, [1957] 1 All E.R. 125; *Houghland* v. *R. R. Low (Luxury Coaches), Ltd.*, [1962] 2 All E.R. 159; *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, [1963] 2 All E.R. 575; *John Carter (Fine Worsteds), Ltd.* v. *Hanson Haulage (Leeds), Ltd.*, [1965] 1 All E.R. 113; *Morris* v. *C. W. Martin & Sons, Ltd.*, [1965] 2 All E.R. 725; *Thompson* v. *Nixon*, [1965] 2 All E.R. 741.

As to the classes of bailment and liability of bailees, see 2 Halsbury's Laws (3rd Edn.) 94 et seq. As to the liabilities of carriers, see ibid., vol. 4, p. 137 et seq. For cases see 3 Digest (Repl.) 55 et seq.; 8 Digest (Repl.) 17 et seq.

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(1) *Anon.* (1410), Y.B. 11 Hen. 4, fo. 33, pl. 60; 12 Digest (Repl.) 250, *1936*.

(2) *Southcote's Case* (1601), 4 Co. Rep. 83 b; 76 E.R. 1061; sub nom. *Southcot* v. *Bennet*, Cro. Eliz. 815; 3 Digest (Repl.) 66, *78*.

(3) *Vere* v. *Smyth* (1671), 2 Keb. 830; 84 E.R. 525; sub nom. *Vere* v. *Smith*, 1 Vent. 121; 34 Digest (Repl.) 150, *1032*.

(4) *Anon.* (1487), Y.B. 2 Hen. 7, fo. 11, pl. 9; 12 Digest (Repl.) 250, *1939*.

(5) *Williams* v. *Lloyd (Hide)* (1628), W.Jo. 179; Palm. 548; 82 E.R. 95; 3 Digest (Repl.) 66, *76*.

(6) *Countess of Salop* v. *Crompton* (1600), Cro. Eliz. 784; 78 E.R. 1014; sub nom. *Countess of Shrewsbury's Case*, 5 Co. Rep. 13 b; 36 Digest (Repl.) 78, *425*.

(7) *Bonion's Case* (1315), Fitz. Abr., tit. Detinue, 59; Sir William Jones on Bailments, 36, 37.

(8) *Tisdale* v. *Essex* (1617), Hob. 34; Moore, K.B. 861; 1 Roll. Rep. 397; 3 Bulst. 204; 1 Brownl. 23; 80 E.R. 185; 31 Digest (Repl.) 139, *2772*.

(9) *Andrew's Case* (1591), Cro. Eliz. 214; 2 Leon. 104; 78 E.R. 469; 31 Digest (Repl.) 145, *2836.*

(10) *Broking* v. *Cham* (1617), Cro. Jac. 425; 1 Roll. Abr. 95; 79 E.R. 363; 31 Digest (Repl.) 140, *2780.*

(11) *Mores* v. *Conham* (1610), Owen, 123; 74 E.R. 946; 37 Digest (Repl.) 13, *97.*

(12) *Mors* v. *Slew* (1672), 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Mod. Rep. 85; T.Raym. 220; 1 Vent. 190, 238; 84 E.R. 548, 601, 624, 638; 8 Digest (Repl.) 20, *106.*

(13) —— v. *Marshall* (1441), Y.B. 19 Hen. 6, fo. 49, pl. 5; 12 Digest (Repl.) 250, *1938.*

(14) *Riches* v. *Brigges* (1602), Yelv. 4.

(15) *Pickas* v. *Guile* (1608), Yelv. 128; 80 E.R. 64; 12 Digest (Repl.) 250, *1941.*

(16) *Wheatley* v. *Low* (1624), Cro. Jac. 668; 79 E.R. 578; sub nom. *Loe's Case*, Palm. 281; 12 Digest (Repl.) 250, *1942.*

Action for breach of contract of carriage.

The plaintiff declared that Bernard, the defendant, on Nov. 10, 1701, undertook to take up several hogsheads of brandy then in a cellar in D. and safely and securely to lay them down again in another cellar in Water Lane [in the city of London], but that the defendant, his servants and agents, so negligently put them down in the other cellar that one of the casks was staved and a great quantity of brandy was spilt. After Not Guilty pleaded and a verdict for the plaintiff, there was a motion in arrest of judgment for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. The case being thought to be a case of great consequence, it was this day argued by the whole court.

GOULD, J.: I think this is a good declaration. The objection that has been made is because there is no consideration laid. But I think it is good either way, and that any man who undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost or come to any damage, and if a praemium be laid to be given, then it is without question so. The reason of the action is the particular trust reposed in the defendant, to which he has concurred by his assumption and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is nudum pactum [see Y.B. 11 Hen. 4, fo. 33, pl. 60 (*Anon.* (1)), cited post p. 10]. So if goods are deposited with a friend, and are stolen from him, no action will lie. But there will be a difference in that case upon the evidence how the matter appears. If they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. The same difference is where he comes to goods by finding. But if a man takes upon himself expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable without a gross neglect. *Southcote's Case* (2) is a hard case indeed, to oblige all men that take goods to keep to a special acceptance that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of, and, indeed, it appears by the report of that case in CRO. ELIZ. 815, that it was adjudged by two judges only, viz., GAWDY and CLENCH, JJ. But in 1 VENT. 121 [*Vere* v. *Smith* (3)] there is a breach assigned upon a bond conditioned to give a true account that the defendant had not accounted for £30. The defendant showed that he locked the money up in his master's warehouse, and it was stolen from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody on those terms.

POWYS, J., agreed upon the neglect.

POWELL, J.: The doubt is because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire and that he is to be paid for his pains. So that the question is whether an action will lie against a man for doing the office of a friend, when no particular neglect is shown. I hold that an action will lie, as this case is. In order to make it out, I shall first show that there are great authorities for me and none against me; secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider *Southcote's Case* (2).

1. Those authorities in the REGISTER 110 a. b. of the pipe of wine and the cure of the horse are in point, and there can be no answer given them, but that they are writs which are framed short. A writ upon the case must mention everything that is material in the case, and nothing is to be added to it in the count, but the time, and such other circumstances. But even that objection is answered by RAST. ENTR. 13 c. where there is a declaration so general. The YEAR BOOKS are full in this point. In Y.B. 43 Edw. 3, 33 A. there is no particular act shown. There, indeed, the weight is laid more upon the neglect than the contract. But in Y.B. 48 Edw. 3, 6, and Y.B. 19 Hen. 6, 49 [—— v. *Marshall* (13)], there the action is held to lie upon the undertaking and that without that it would not lie, and, therefore, the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. Y.B. 2 Hen. 7, 11 [*Anon.* (4)], 7 Hen. 4, 14—these cases are all in point, and the action adjudged to lie upon the undertaking.

2. To give the reason of these cases, the gist of these actions is the undertaking. The party's special assumpsit and undertaking obliges him so to do the thing that the bailor comes to no damage by his neglect. And the bailee in this case shall answer for accidents as if the goods are stolen, but not such acidents and casualties as happen by the act of God, as fire, tempest, etc. So it is, W.Jo. 179 and PALM. 548 [*Williams* v. *Lloyd* (5)], for the bailee is not bound upon any undertaking against the act of God. JONES, J., in that case puts the case in 22 LIB. ASS. 41, where the ferryman overloaded the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, viz., the overloading the boat. It would not have lain, says he, without that act, because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overload the boat. Bailees are chargeable in case of other accidents, because they have a remedy against the wrongdoers, as in case the goods are stolen from him, an appeal of robbery will lie wherein he may recover the goods which cannot be had against enemies in case they are plundered by them, and, therefore, in that case he shall not be answerable. It is objected that there is no consideration to ground the action upon. As to this, the difference is between being obliged to do the thing and answering for things which he has taken into his custody upon such an undertaking. An action, indeed, will not lie for not doing the thing for want of a sufficient consideration, but yet if the bailee will take the goods into his custody, he shall be answerable for them, for the taking the goods into his custody is his own act. This action is founded upon the warranty upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. A man may warrant a thing without any consideration. Therefore, when I have reposed a trust in you upon your undertaking, if I suffer when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop (*Countess of Salop* v. *Crompton* (6)). An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration that the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally.

A 3. *Southcote's Case* (2)* is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events. That is hard. COKE reports the case upon that reason, but makes a difference where a man undertakes specially to keep goods as he will B keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In Y.B. 9 Edw. 4, 40 B., there is such an opinion by DANBY. The case in Y.B. 3 Hen. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. In Y.B. 6 Hen. 7, 12, there is such an opinion by the by, and this is all the foundation of *Southcote's Case* (2). But there are cases there C cited which are stronger against it, as Y.B. 10 Hen. 7, 26, 29 LIB. ASS. 28, the case of a pawn. COKE would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn, but that will make no difference because he has a special property in the thing bailed to him to keep. 8 Edw. 2 [1315], FITZ. ABR., tit DETINUE, 59 [*Bonion's Case* (7)], the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that D case, sure it would be hard that a man who takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. It is answered to that, that the bailee might take them specially. Many lawyers do not know that difference, or however it may be with them, half mankind has never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against E all events. But if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

SIR JOHN HOLT, C.J.—The case is shortly this. This defendant undertakes to remove goods from one cellar to another and there lay them down safely, and F he managed them so negligently that for want of care in him some of the goods were spoiled. Upon Not Guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment on the ground that the declaration is insufficient because the defendant is neither laid to be a common porter nor that he is to have any reward for his labour. So that the defendant is not chargeable G by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the H several sorts of bailments. There are six sorts of bailments. The first sort of bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor, and this I call a depositum. It is that sort of bailment which is mentioned in *Southcote's Case* (2). The second sort is when goods or chattels that are useful are lent to a friend gratis to be used by him, and this is called commodatum, because the thing is to be restored in specie. The I third sort is when goods are left with the bailee to be used by him for hire. This is called locatio et conductio; the lender is called locator, and the borrower conductor. The fourth sort is when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor. This is called in Latin vadium, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about

* That notion in *Southcote's Case* (2) (4 Co. Rep. 83 b.) that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court.

them for a reward to be paid by the person who delivers them to the bailee who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody who is to carry them or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stolen without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me [*Southcote's Case* (2)], where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But COKE has improved the case in his report of it, for he will have it that there is no difference between a special acceptance to keep safely and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law is so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded, and, therefore, it is incumbent upon them that advance this doctrine to show an undisturbed rule and practice of the law according to this position. To show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show that there never was any such resolution given before *Southcote's Case* (2).

The 29 LIB. ASS. 28 is the first case in the books upon that learning, and there the opinion is that the bailee is not chargeable if the goods are stolen. In 8 Edw. 2, FITZ. ABR., tit. DETINUE, 59 [*Bonion's Case* (7)], where goods were locked in a chest and left with the bailee, and the owner took away the key and the goods were stolen, it was held that the bailee should not answer for the goods. That case, they say, differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest, and he has as great power to defend them in one case as in the other. The case in Y.B. 9 Edw. 4, 40 B. was but a debate at Bar. For DANBY was but a counsel then, although he had been Chief Justice in the beginning of Edward IV's reign, yet he was removed and restored again upon the restitution of Henry VI, as appears by DUGDALE'S CHRONICA SERIES. So what he said cannot be taken to be any authority, for he spoke only for his client and GENNEY for his client said the contrary. The case in Y.B. 3 Hen. 7, 4, is but a sudden opinion and that but by half the court, and yet that is the only ground for this opinion of COKE, which, besides, he has improved. The practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. It was practised so before my time, during all the time of PEMBERTON, C.J., and ever since, against the opinion of that case. When I read *Southcote's Case* (2) previously, I was not so discerning as my brother POWYS tells us he was, to disallow that case at first, and came not to be of this opinion until I had well considered and digested that matter. Although I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, although he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he

keeps his own is an argument of his honesty. A fortiori he shall not be charged where they are stolen without any neglect in him. Agreeable to this is BRACTON, lib. 3, c. 2, 99 b:

> "J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiae vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare."

Suppose the bailee is an idle, careless, drunken fellow, and comes home drunk and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own, yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So this sort of bailee is the least responsible for neglects, and under the least obligation of anyone, being bound to no other care of the bailed goods than he takes of his own. This BRACTON I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in JUSTINIAN'S INSTITUTES, lib. 3, tit. 15. There the law goes further, for there it is said:

> "Ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, desidiae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suae facilitati id imputare debet."

So that a bailee is not chargeable without an apparent gross neglect, and if there is such a gross neglect it is looked upon as an evidence of fraud. Suppose the bailee undertakes safely and securely to keep the goods in express words, yet even that will not charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. HOB. 34 [*Tisdale* v. *Essex* (8)], a covenant that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrongdoers. CRO. ELIZ. 214, acc. [*Andrew's Case* (9)]; CRO. JAC. 425, acc. [*Broking v. Cham* (10)], upon a promise for quiet enjoyment. If a promise will not charge a man against wrongdoers when put in writing, it is hard it should do it more so when spoken. DOCTOR AND STUDENT, 130, is in point, that although a bailee promises to re-deliver goods safely, yet, if he has nothing for the keeping of them, he will not be answerable for the acts of a wrongdoer. So there is neither sufficient reason nor authority to support the opinion in *Southcote's Case* (2); if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

As to the second sort of bailment, viz., commodatum or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so if the bailee be guilty of the least neglect he will be answerable, as if a man should lend another a horse to go westward, or for a month, if the bailee goes northward or keeps the horse above a month, if any accident happens to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used not otherwise than he was lent, that accident would not have befallen him. This is mentioned in BRACTON ubi supra. His words are:

> "Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligeetiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem

sibi commodatam domi, secum detulerit cum peregre profectus suerit, et illam incursu hostium vel praedonum, vel naufragio amiserit non est dubiumquin ad rei restitutionem teneatur."

I cite this author, although I confess he is an old one, because his opinion is reasonable and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable and he were stolen thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. BRACTON says the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist.

As to the third sort of bailment, viz., locatio or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods when the time of the hiring is expired. Here again I must recur to my old author [BRACTON], fol. 62, b.:

"Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia; qualem deligentissimus paterfamilias suis rebus adhibet, quam si praestiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Necsufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est."

Whence it appears that, if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses, and if he uses that, he shall be discharged. But every man, however diligent he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz., vadium or a pawn, in this I shall consider two things, first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt and to compel the pawner to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, etc., but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. Then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open and the jewellery taken from thence, she would be excused, if she wears them abroad and is there robbed of them, she will be answerable. The reason is because the pawn is in the nature of a deposit, and as such is not liable to be used. To this effect is OWEN, 123 [*Mores* v. *Conham* (11)]. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat. As to the second point, BRACTON, 99, b, gives you the answer:

"Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis et pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere."

In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt, but yet it is sufficient, if the pawnee uses true diligence, and he will be indemnified in so doing, and, notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 LIB. ASS. 28, and *Southcote's Case* (2) is. But, indeed, the reason given in *Southcote's Case* (2) is because the pawnee has a special property in the pawn. But that is not the reason of the case, and there is another reason given for it in the book of ASSIZE, which is, indeed,

the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. Indeed, if the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods and the special property of the pawnee is determined. A man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to the bailee, those cases are of two sorts, either a delivery to one that exercises a public employment, or a delivery to a private person. If it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. This is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged in *Mors* v. *Slew* (12). The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. This is the reason the law is founded upon in that point. The second sort are bailees, factors and such like. Although a bailee is to have a reward for his management, yet he is only to do the best he can. If he be robbed, etc., it is a good account. The reason of his being a servant is not the thing, for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, etc. Yet, if he receives his master's money and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. Yet this servant is not a domestic servant, nor under his master's immediate care. The true reason of the case is that it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it. It is allowed in the other cases by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken that the bailee is to have no reward for his pains, but yet that by his ill-management the goods are spoiled. Secondly, it is to be understood that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable: as if a drunken man had come by in the streets and had pierced the cask of brandy. In this case the defendant would not have been answerable for it because he was to have nothing for his pains. Then, the bailee having undertaken to manage the goods and having managed them ill and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called mandatum. It is an obligation which arises ex mandato. It is what we call in English an acting by commission. If a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius in his Commentaries upon Justinian, lib. 3, tit. 27, 684, defines mandatum to be contractus quo aliquid gratuto gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton ubi supra says:

> "Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis."

I do not find this word in any other author of our law besides in this place in Bracton, which is a full authority if it be not thought too old. It is supported by good reason and authority. A

The reasons are, first, because in the case, a neglect is a deceit to the bailor. For when he instructs the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. A breach of a trust undertaken voluntarily will be a good ground for an action: 1 Roll. Abr. 10; Y.B. 2 Hen. 7, 11 [*Anon.* (4)], a strong case to this matter. There the case was an action against a man who had undertaken to keep a hundred sheep, for letting them be drowned by his default. There the reason of the judgment is given, because when the party has taken upon himself to keep the sheep and afterwards suffers them to perish in his default inasmuch as he has taken and executed his bargain and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz., his agreement and promise, and afterwards broken on his side that shall give a sufficient cause of action. Secondly, it is objected that there is no consideration to ground this promise upon, and, therefore, the undertaking is but nudum pactum. To this I answer that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other on such a day, the defendant would not have been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. If a man will do that and miscarries in the performance of his trust, an action will lie against him for that, although nobody could have compelled him to do the thing. The Y.B. 19 Hen. 6, 49 [—— v. *Marshall* (13)], and the other cases cited by my brothers show that this is the difference. But in Y.B. 11 Hen. 4, 33 [*Anon.* (1)] this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter for that he had undertaken to build the plaintiff a house within such a time and had not done it, and it was adjudged the action would not lie. There the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A. and in consideration thereof he promises to re-deliver them, if an action will lie for not re-delivering them, and in Yelv. 4 [*Riches* v. *Brigges* (14)] judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal there was judgment afterwards entered for the defendant in the like case: Yelv. 128 [*Pickas* v. *Guile* (15)]. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4 was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in *Wheatley* v. *Low* (16), in the King's Bench, and that judgment was affirmed upon a writ of error. Yet there is no benefit to the defendant, nor any consideration in that case, but the having the money in his possession and being trusted with it, and yet that was held to be a good consideration. So a bare being trusted with another man's goods must be taken to be a sufficient consideration if the bailee once enter upon the trust, and take the goods into his possession. The declaration in *Mors* v. *Slew* (12) was drawn by the greatest draughtsman in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in that a reward was to be paid for the carriage. So it has been usual to put it in the writ where the suit is by original. B C D E F G H I

I have said thus much in this case, because it is of great consequence that the law should be settled in this point, but I do not know whether I may have settled it, or may not rather have unsettled it. However that may happen, I have stirred these points which wiser heads in time may settle.

Judgment for plaintiff.

SUTTON'S HOSPITAL CASE

[Court of Exchequer Chamber (Sir Edward Coke, C.J., Sir Lawrence Tanfield, C.B., Houghton, Nichols, Doderidge, Winch, Croke and Warburton, JJ., Bromley, Altham and Snigge, BB.), Michaelmas Term, 1612]

[Reported 10 Co. Rep. 1a, 23a; Jenk. 270; 77 E.R. 937, 960]

Corporation—Essential elements—Lawful incorporation—Incorporation of persons—Name and locality—Incidental powers—Criminal liability.

Certain things are of the essence of a corporation—lawful authority of incorporation by the common law, authority of Parliament, royal charter, or prescription; persons, natural or bodies incorporate, to be incorporated; a name by which those persons are incorporated; and a locality.

A corporation aggregate may be a body without a head. To the creation of a corporation the law has not restrained itself to any prescript and incompatible words, and when a corporation is duly created a number of incidents are silently attached, as, e.g., power to purchase and convey away property, to lease, to sue and be sued, to have a seal.

A corporation cannot be found guilty of criminal offences for which death or imprisonment is the only penalty or which by their nature can only be committed by natural persons.

Notes. Considered: *Birmingham School Case* (1726), Gilb. Ch. 178; *A.-G.* v. *Middleton* (1751), post; *River Tone Conservators* v. *Ash* (1829), 10 B. & C. 349; *Riche* v. *Ashbury Rail. Carriage Co.* (1874), L.R. & Exch. 224; *Wenlock* v. *River Dee Co.* (1883), 36 Ch.D. 675, n. ; *British South Africa Co.* v. *De Beers Consolidated Mines*, [1910] 1 Ch. 354. Referred to: *Hayward* v. *Fulcher* (1628), Palm. 491; *Lyn* v. *Wyn* (1665), O.Bridg. 122; *Anon.* (1670), 2 Vent. 35; *Thomas* v. *Sorrel* (1673), 3 Keb. 223; *Barker* v. *Keete* (1678), Freem.K.B. 249; *Merchant Adventurers* v. *Rebow* (1686), Comb. 53; *Philips* v. *Bury* (1694), 1 Ld. Raym. 5 (post 53); *College of Physicians* v. *Salmon* (1695), 1 Ld. Raym. 680; *Owen* v. *Saunders* (1696), 1 Ld. Raym. 158; *Winton Corpn.* v. *Wilkes* (1705), 2 Ld. Raym. 1129; *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463; *A.-G.* v. *Bowyer* (1800), 5 Ves. 300; *R.* v. *Westwood* (1830), 7 Bing. 1; *Rutter* v. *Chapman* (1841), H. & W. 93; *R.* v. *Dulwich College* (1851), 17 Q.B. 600; *Bostock* v. *North Staffordshire Rail. Co.* (1855), 24 L.J.Q.B. 225; *Colchester* v. *Kewney* (1866), L.R. 1 Exch. 368; *Ford* v. *Harington* (1869), 1 Hop. & Colt. 331; *A.-G.* v. *L.C.C.*, [1901] 1 Ch. 781; *Bonanza Creek Gold Mining Co., Ltd.* v. *Regem, A.-G. for Quebec, etc.* (*Interveners*), [1916–17] All E.R.Rep. 999.

As to corporations, see 9 Halsbury's Laws (3rd Edn.) 3 et seq.; and for cases see 13 Digest (Repl.) 182 et seq.

Cases referred to:

(1) *Buckland* v. *Fowcher* (1486), cited in 10 Co. Rep. 27, 29; 77 E.R. 965; 13 Digest (Repl.) 203, *219*.

(2) *Ramsey's Case* (1487), cited in 10 Co. Rep. 27; 77 E.R. 965; 13 Digest (Repl.) 202, *210*.

(3) *Dean and Chapter of Norwich's Case* (1598), 3 Co. Rep. 73a; 2 And. 120, 165; 76 E.R. 793; 13 Digest (Repl.) 190, *82*.

(4) *Thetford School Case* (1609), 8 Co. Rep. 130 b; 77 E.R. 671; 8 Digest (Repl.) 443, *1328*.

(5) *Croft* v. *Howel* (1578), 2 Plowd. 530; 75 E.R. 783; 13 Digest (Repl.) 194, *150*.

(6) *Mariot* v. *Mascal* (1588), 1 And. 202; 123 E.R. 430; sub nom. *Marriot* v. *Pascalls*, 1 Leon. 159; sub nom. *Fanshawe's Case*, Moore, K.B. 228; 30 Digest (Repl.) 454, *956*.

(7) *Duchy of Lancaster Case* (1561), post p. 146, 1 Plowd. 212; 75 E.R. 325; 11 Digest (Repl.) 564, *24*.

(8) *Willion* v. *Berkley* (1561), 1 Plowd. 225; 75 E.R. 345; 11 Digest (Repl.) 675, *997.*

(9) *Fulmerston* v. *Steward* (1554), 1 Plowd. 101; 75 E.R. 160; 13 Digest (Repl.) 182, *2.*

(10) *Queen Philippa* v. *Chichester* (*Abbess*) (1344), Y.B. 18 Edw. 3, fo. 1, pl. 6; 11 Digest (Repl.) 564, *26.*

Action by Simon Baxter, plaintiff, against Richard Sutton and John Lawe, defendants, alleging trespass by them in the Charterhouse.

The case was heard in the Exchequer Chamber by all the judges of England and barons of the Exchequer (except the Chief Justice of the King's Bench, who was then sick), viz., SIR ROBERT HOUGHTON, SIR AUGUSTINE NICHOLS, SIR JOHN DODERIDGE, SIR HUMFREY WINCH, SIR EDWARD BROMLEY, SIR JOHN CROKE, SIR JAMES ALTHAM, SIR GEORGE SNIGGE, SIR PETER WARBURTON, SIR LAURENCE TANFIELD, C.B., and SIR EDWARD COKE, Chief Justice of the Common Pleas. It was resolved by them all (except by SNIGGE, B., and CROKE, J.) that judgment should be given against the plaintiff.

Walter, *Yelverton* and *Bacon* for the plaintiff.
Serjeant Hutton, *Coventry*, and *Hobart* for the defendant.

SIR EDWARD COKE, C.J., in his report, states: The first part of the charter contains a short recital of two things. First, of the title of the Act of 1612, viz.:

> "An Act to confirm and enable the erection and establishment of an hospital and free grammar school, done and intended to be done by Thomas Sutton, Esq."

which title proves that no hospital, etc., was founded by the Act itself; but the scope of the Act was to enable Sutton to erect and establish a hospital, etc., and, therefore, the title says: "intended to be done and performed by Thomas Sutton, Esq." That also appears by divers parts of the body of the Act which are all in futuro and nihil in præsenti.

> "1. Be it, therefore, enacted, that in the town of Halingbury, etc., there may be builded one meet house for abiding of poor people and scholars, etc.,"

which are words de futuro, and it is not certain in what part of the town the house shall be built, etc.

> "2. And that the same shall and may be called and named the hospital of King James";

which are words also de futuro.

> "3. And that the Lord Archbishop of Canterbury, etc., shall and may be the governors, etc. 4. And that the same governors, etc., shall for ever hereafter stand and be incorporated,"

which words ought to be intended to take effect after the erection of the hospital, etc., in a certain place, etc., and so the construction is in futuro, which well appears by the words de futuro following:

> "and may have perpetual succession. 5. And may for ever hereafter have, hold, and enjoy, lordships, manors, etc., without licence of alienation or licence of mortmain."

By which it appears that this clause is not in effect but a licence to give manors, lands, etc., held in capite without other licence of alienation, and also without other licence of mortmain. But this clause was superfluous and impertinent if the land should pass by the Act itself, for then no licence in those cases was requisite. Without question, if it were admitted that there was a corporation, yet no lands are given to it by these words de futuro. Also, although the lands were given them, yet the King by his letters patent can erect and incorporate a hospital in the

Charterhouse, which was purchased after the Act, and the action of trespass in the case at Bar is for a trespass done in the Charterhouse. It was resolved by all the justices and barons of the Exchequer (except Croke, J.) that the Act of 1612 does not incorporate the governors, etc., but in futuro, which never did nor can take effect and by consequence no land was or could be given thereby. The second branch of the recital is of the purchase of the Charterhouse after the Act, which, as it is there rehearsed, is more fit and commodious than Halingbury to be converted into a hospital.

In the second part Sutton is a suitor and petitioner to the King for four things: (i) To give licence to found, erect, and establish a hospital-house, etc., and free grammar school, etc., at or in the Charterhouse, wherein has been observed the uncertainty of the suit, viz., "at or in the Charterhouse," but of that hereafter. (ii) To incorporate the governors hereafter named, so that Sutton himself names the governors which the King incorporates. (iii) By such name of incorporation as is hereafter mentioned to have capacity and ability, etc., by which also it appears that Sutton devises and prescribes the name of the incorporation, and by all these three clauses it appears that the suit of Sutton and his express consent was that the governors should be named of the said house called the Charterhouse. (iv) Sutton was suitor, "that the governors, etc., might take in mortmain for the better maintenance of the said hospital, free school, preacher," etc.

The third part of the letters patent contains grants and acts made by the King in two manners, sc. by way of licence and by way of grant. Of the licences some are requisite, some abundant and not requisite, and some requisite for the sustentation of the poor, etc., and not to the essence of the corporation; and of the grants, some are in præsenti, and some in futuro, and of each of them some are of necessity, and some explanatory and not of necessity; and those which are of necessity, some are of necessity to the creation of this body politic, and some to the continuance and preservation of it. Into those branches all the said letters patent are divided, which shall be observed as they arise and have place in the same letters patent: but before all the licences and grants, the King prefixes a preamble,

> "The King affecting so good a work, of his princely disposition and care for the furtherance thereof, and that the same may take the better effect, etc. [wherein appeareth the honour, charity, and pious disposition of the King] giveth licence to Thomas Sutton, his heirs, executors, administrators, and assigns, at all times hereafter at their will and pleasure to place, erect, found, and establish, at or in the said house called the Charterhouse, one hospital-house, and place of abiding for the finding, sustentation, and relief of poor, aged, maimed, needy, or impotent people, etc. Also to erect, found, etc., one free school for the instruction, teaching, and maintenance of poor children or scholars, etc. And to place and maintain a learned schoolmaster and usher to teach and instruct the said children in grammar. And also one learned and godly preacher to preach and teach the word of God to all the said persons, poor people, and children, members, and officers at or in the said house."

This, in the first place, contains the end of Sutton's piety and charity, for sapiens incipit a fine, et quod primum est in intentione ultimum est in executione. And that was a grand motive to the King of his royal authority to give him means, sc. by creation of a capable body politic by way of incorporation, to have a perpetual succession to perfect and perpetuate so pious and charitable a work. That the incorporation ought to precede the execution of this licence is evident by the words and coherence of the letters patent, sc. for this licence is in futuro, sc. to Thomas Sutton, his heirs, executors, administrators, and assigns, "at all times hereafter at their will and pleasure, etc.," so that it is future as well in persons, heirs, executors, etc., as in the thing to be done. But when he comes to the clause of incorporation, he does it per verba de præsenti tempore:

> "And the said persons and their successors by the name, etc., we do by these presents for ever hereafter really and fully incorporate, etc."

By which it follows that, the incorporation being present, and the execution of this part of the licence future, the incorporation ought of necessity to precede the execution of the licence. Then forasmuch as the principal foundation of the scruple was conceived upon these words, "to found, erect, and establish," the true etymology and genuine sense of them was considered; and ex vi termini fundare, nihil aliud est quam fundamentum jacere seu ponere, etc., to lay the foundation of a building; and in this sense the Holy Ghost (which moved Sutton to this work of charity) in the scripture takes it. And, therefore, in the 1 Regum cap. 6, 37, Fundata est domus anno primo, et anno 11 perfecta fuit domus in omni opere suo. And 1 Regum cap. 16, 34, Ædificavit in diebus illis Hiel de Bethel Jerico in Abiram primitivo suo fundavit, et in Segub novissimo suo posuit portas. By which it appears, that to found is to lay the foundation of a building, which is the first mechanical part of architecture. When the foundation is laid, then comes the erection of the house. Although the foundation be well laid, and thereupon a building well erected, yet it ought to be well conjoined and established, and, therefore, this word establish is added to make the building have continuance. 2 Reg. 13, Stabiliam thronum ejus; that is, I will make his throne to have perdurance and continuance. So that to found, erect, and establish, are opera laboris, et laboris architector', and that appears by the words of the charter itself, sc. "the King affecting so good a work," tam bonum opus. Moreover, the subsequent words prove it also: "to found, erect, and establish." What? "a hospital house." So that it clearly appears that the effect of this licence is to make fit and to finish and furnish a hospital-house for the habitation of the poor, etc. See after Michaelmas, 34 & 35 Eliz., the case of the hospital of Bridewell (cited post p. 20, 21) for the exposition of these words, fundo, erigo, et stabilio, which is a stronger case than this is. This word "place" in the first place is to be intended, as has been said, in the last place, sc. to place poor in it, to erect a free school for the instruction of youth, and for the maintenance of a preacher.

But how shall this holy and charitable intention (that it should remain in succession for ever) be brought to an end and effect? The charter itself shows it in effect in this manner: it is impossible to take in succession for ever without a capacity, and a capacity to take in succession cannot be without incorporation, and the incorporation cannot be created without the King. For this reason the charter says:

> "And for the maintenance and continuance of the said hospital, etc., and that the same may take the better effect, that the said persons, etc., be one body corporate and politic, to have perpetual succession for ever to endure; we do by these presents for ever hereafter fully and really incorporate, etc., to have capacity and ability to take, etc."

Without this capacity the end cannot be effected, for inhabitants of a town, or other single persons (who have not capacity to take in succession but only to their singular heirs) have capacity to take an incorporation; and after their incorporation they have capacity to take in succession any lands, tenements, or hereditaments; unde sequitur, that the incorporation which gives capacity ought to precede the donation of any land, etc. Another licence is given to this new incorporation to take in mortmain. This licence is not of necessity, either of the essence of the incorporation, or of the continuance of it; but yet it is requisite for the establishment and maintenance of the end, sc. to have the poor sustained, and scholars instructed, etc., for they cannot be maintained without a revenue, and the revenue (as has been said) they cannot take and retain without a licence in mortmain; and, therefore, those who, sc. incorporation and licence in mortmain ought to precede the donation. These words to found, erect, and establish a hospital-house, cannot be extended to the incorporation, for that belongs only to the King, and that the King makes; not to any dotation, for as yet (as has been said) there is not any capacity; ergo, it extends only to the building and finishing of the said house to be a fit habitation for poor, etc.

A Sutton, thinking and re-thinking that as well the incorporation as the licence in mortmain were in their several degrees requisite to bring his good and charitable purpose to effect, to the end that the King would grant that which was only in his power to grant and which he himself without the King could not do, he was a suitor to the King to grant him licence to do that which of himself in respect of the ownership of land he might do without the King, sc. to build, finish, and furnish
B the said house for the habitation of poor, as well before the incorporation as after. But to give it succession, etc., as has been said, he could not. Therefore, this licence was but explanatory to declare what Sutton as owner of the land might do, either with the King's licence or without the King, and, therefore, the King could not countermand this licence, because it is but declaratory of that which Sutton might do as owner of the land without any licence. This appears by the
C book in 3 Hen. 7, Fitz. Grant. 36, the record whereof I have seen, between J. Buckland, vintner, plaintiff, in an action of trespass, and Richard Fowcher, chaplain, defendant, Michaelmas Term, 1486, Rot. 155, in the King's Bench [*Buckland* v. *Fowcher* (1)], and in the report at large [*Ramsey's Case* (2)], 2 Hen. 7, 13, a., b., where the case in effect is that King Henry IV by his letters patent in the sixth year of his reign, reciting that Robert Ramsey was seised in fee of
D a house in the parish of St. Margaret in London, called the Sun, etc., notwithstanding the Statute of Mortmain, de gratia sua speciali, and for £20 gave licence to Robert Ramsey, that he might give 20 marks rent, issuing out of the said house,

> "cuid capellano divini celebranti ad altare beatæ Mar' in eccles. S. Magni London' singul' diebus pro salubri statu præd' Rob' et Johan' uxor' suæ, etc.
> E Habendum et tenendum eid' capellano et successoribus suis capellan' Cantariæ praed' divina in eccles. præd' ad altare præd' pro salubri statu, etc. juxta ordinationem præd' Rob. in hac parte faciend' celebrat' imperpet', etc."

Afterwards the said Robert Ramsey, by his deed indented tripartite, June 10, 1407, founded, ordained, and erected the said chantry, and ordained and named one John Meadow to be the first chaplain to do the said divine services; and
F further by the said deed granted to the said John Meadow, the first chaplain, 10 marks of yearly rent issuing out of the said house, to have to him and his successors chaplains of the said chantry, at four usual feasts in London to be paid, with clause of distress, to him and his successors; and further appointed by the same deed, that he himself should present to the said chantry during his life; and after his decease, that Johanna his wife should present to it during her life, and after
G her decease the parson and churchwardens of the said church of St. Magnus and their successors. Afterwards the said John Meadow died, and after divers vacations the defendant Richard Fowcher was presented to the said chantry, who for the said rent arrear entered into the said house the door being open, and took a cup of the plaintiff's for a distress, etc., for which taking the action was brought, upon which matters the parties demurred in law. This case was adjourned into
H the Exchequer Chamber, and there before all the judges of England divers objections were made against this licence and grant. (i) Because they were cuidam capellano, and named none in certain; and when the King's grant is uncertain it is void; as if the King licenses one to give 20 marks rent cuidam Abbati, the grant is void, because it is uncertain. (ii) There is not such chaplain until Robert Ramsey has
I named and ordained one, so that it appears that the grant would be to him who was not in rer' natura; as if the King gives licence to grant to the mayor and commonalty of Islington, it is void where there is not any such incorporation, although the inhabitants of Islington be afterwards incorporated by the name of mayor and commonalty, because there was no such corporation in rer' natura at the time of the grant. (iii) It was objected that the King had not made any incorporation in that case, and an incorporation is a thing to be made only by the King himself; and these words juxta ordinationem per Robert Ramsey fiendam, should not enable the said Ramsay to make an incorporation, for the King cannot give licence to any

to make an incorporation, but the said words would give him power to make ordinances, first touching masses and other divine services. Of what manner of habit he should be. To have perpetual succession, sc. elective, presentative, or donative, and that is the effect of the said words, and not to make a corporation, and the King's grant should not be taken by implication, sc. by the words to make an incorporation, and also to give licence to grant the said rent, for then the King's grant would enure to two intents. (iv) Admitting that there should be an incorporation by implication, yet the incorporation ought to be before the licence, and here the licence is before the incorporation, and therefore void. (v) The grant ought to have been that the King gave licence facere et erigere Cantar', etc., and there were not any such words in the charter, but only licence to grant a rent, etc., cuidam capellano, etc. (vi) The licence is secundum ordinationem per R. Ramsey fiendam, and, therefore, the King is deceived, because he could not have knowledge what ordinance it would be. (vii) It was objected that the distress was without warrant and void, because the licence did extend to grant a rent only without mention of any distress. Which objections I have here collected out of the book reported at length, 2 Hen. 7, 13, A. B. and the report of FITZHERBERT in 3 Hen. 7, GRANT 36, and out of the record itself.

As to the first and second objection, it was resolved that the grant was good, for all the grants of chantries are of such form, sc. cuidam capellano, and although there be not such chaplain at the time, it is not to the purpose; for if the King grants to the commonalty of Islington that they shall be incorporated of a mayor and bailiffs, and that they have power to choose one, it is good, although the election of the mayor is future. So note reader, a difference between an estate or interest which none can take without present capacity, and a power, liberty, or franchise or thing newly created, which may take effect in futuro. As to the third, it was resolved that where the King by his charter says cuidam capellano, that was a sufficient incorporation; and when he says in the habendum, sibi et successoribus suis, that makes a sufficient succession. And so this grant of the King enures to three intents, sc. to make an incorporation, to make a succession, and to grant a rent. As to the fourth, it was resolved that where it was objected that the licence to found the chantry should be first, and to grant after, that is not necessary; for it is not material which is before (for the law will construe that to precede which ought to be first), but here they are simul et semel. As to the fifth, that in the licence there were not words of fundare, erigere, facere, it was resolved that, notwithstanding that, the grant was good. Note ex hoc reader, that to the essence of a chantry or other body politic, two things are only requisite, sc. an incorporation and a gift, and not any words of fundare, erigere et stabilire, or words to such effect; for no such words were contained in the said grant of Henry IV and yet it was adjudged a good chantry lawfully incorporated and founded; and if such words had been necessary and requisite in law, the judgment ought to have been given against the chantry, because they were omitted in the King's grant. And thereby it appears that in the case at Bar, they were explanatory and of abundance; which is a judgment in the point, by the resolution of the justices in the Exchequer Chamber. As to the sixth point it was resolved that these words, secundum ordinationem per R. Ramsey fiendam, import sufficient certainty, sc. to enable Ramsey to ordain, first, what masses and other divine services should be celebrated; secondly, of what habit or order the chaplain should be; and thirdly, whether he should be elective, presentative, or donative: by force of which words Ramsey in the case at Bar, ordained it to be presentative by the rector of the parish of St. Magnus for ever. As to the seventh objection, it appears by the report of FITZHERBERT ubi supra, that the opinion of the two Chief Justices, HUSSEY and BRIAN, and STARKEY, C.B., and FAIRFAX, J., was that the distress was without warrant, but TOWNSHEND conceived it to be good. But inspecto recordo, it was adjudged that the distress was good and well warranted by the grant; for the chantry-priest distrained in the said house for the rent, and his distress was

A adjudged lawful, and the plaintiff barred. The reasons, as I conceive, were, because the King's charters, made for the erection of pious and charitable works, shall be always taken in the most favourable and beneficial sense; and the most beneficial rent that a man can grant is a rentcharge. A distress is a necessary incident to the rent, for without that the grantee would be without remedy: verba sunt accipienda cum effectu, and words are to be taken with the effect. Year Book 2
B Edw. 3, 3, which case I have cited more at large, because it is notable and pertinent, and stronger (as I conceive) than the case in question.

Power is given to Sutton

> "to place a master of the said hospital. 3. At all times hereafter to place, erect, found, and establish in the said house, etc., one free school for instruct-
C ing youth, [which well expounds the precedent words concerning the hospital, for these words extend only to make fit and to finish and furnish a grammar school within the said Charterhouse] and a learned preacher to teach all in the word of God. 4. We do by these presents, ordain, constitute, limit, and appoint, that the said house and other the premises shall from henceforth for ever hereafter be, remain and continue, and be converted, employed, and used for
D a hospital and house, and place for abiding, etc. And shall for ever hereafter be named, incorporated, and called the hospital of King James founded in the Charterhouse, within the county of Middlesex, at the humble petition, and at the only costs and charges of T. Sutton, Esq., and the same hospital and free school by the name of the Hospital of King James, etc. We do firmly by these presents, erect, found, establish and confirm, to have continuance for ever."

E By this clause, the King in præsenti gives the name of the hospital, but as it appears before, Sutton had devised it, and had sued to the King to name it accordingly; and that the name of the incorporation itself (sc. at the humble suit, etc., of Thomas Sutton) imports; so that, as it is said in Year Books 38 Edw. 3, 14 b. and 21 Edw. 4, 56 a., b., the name of incorporation is as a proper name or name of baptism. In this case Sutton as godfather gave the name, and by the
F same name the King baptised the incorporation. By which it appears that the objection that the King could not give a name to a house which is the inheritance of another is not of any value, for here Sutton has consented and assented to it, and all this is done at his humble suit.

This objection tends to the dissolution of all ancient deans and chapters, for at
G first, as appears in the *Dean and Chapter of Norwich's Case* (3) in 3 Co. Rep. 73a, all the possessions were to the bishop, and yet by his assent the dean and chapter were incorporated and named of the cathedral church, which did then belong to the bishop only and afterwards a certain portion was assigned to the chapter, so that the chapter was before that they had any possessions. That is the reason that of common right the bishop is patron of the Prebendaries because their possessions
H were derived from the bishop, and, therefore, he was founder and patron: and therewith agree Year Books 17 Edw. 3, 40, a. b.; 25 Ass. pl. 8; 10 Edw. 3, 10; 50 Edw. 3, 26, b.; 15 Hen. 7, 11. So that at first the dean and chapter were by the assent of the bishop incorporated and named of the church cathedral of the Bishop. It was said that questions moved in the Exchequer used to be like spirits which may be raised with much ease, but suppressed and vanquished with
I much difficulty, but these questions were like ruinous buildings, more easily thrown down than raised and erected. All the arguments which have been made against this honourable work of charity are hatched out of mere conceit and new invention without any ground of law, and such which have any colour were utterly mistaken.

As to the fourth exception, that the place of every corporation ought to be certain, and Sutton sues and the King licences Sutton to found, erect, etc., a hospital "at or in the Charterhouse," which was uncertain. To that the charter itself expressly answers that the King by this clause ordains, etc.:

"That the said house and other the premises shall from henceforth for ever hereafter be, remain, etc., and shall for ever hereafter be named and called the Hospital of King James founded in the Charterhouse."

So that all the house and other the premises are baptised by the King by the name of the hospital, etc., in which is no shadow of uncertainty, and, therefore, Sutton as to the licence for the mechanical part, which (as has been said) was abundant to fit and finish all or any part of the house for a hospital, etc., yet all the house itself, gardens and orchards, etc., are named by the name of the hospital. It was observed that the King by this clause not only names the said house to be a hospital, but by the name of the hospital erects, founds, establishes, and confirms, so that the King names it and leaves the mechanical part to Sutton to perform.

Of the same importance is the other objection that a known name is not sufficient to found a hospital, but it ought to be described by metes and bounds, as in divers precedents has been used, for it appears in *William de Londres' Case*, 2 Edw. 3, 36 B. [Y.B. 2 Edw. 3, fo. 20, pl. 8]. Adam brought a scire facias against William de Londres of the manor of E.; the defendant pleaded that he himself is master of the hospital of St. Bartholomew, and so bears a name of dignity not named, judgment of the writ. To which the plaintiff replied that that which the defendant calls a hospital is the manor of East Smithfield, and was a manor at the time of the fine levied: and it was held by the court that by this writ he ought to have the manor, as that which the manor was at the time of the fine levied, and whereas the manor was made a hospital after the fine, by this suit he is to defeat your estate and your name, and accordingly it was ruled that the writ was good, which proves that a manor (which imports more variety and uncertainty than a house known by a certain name) may be created into a hospital. And in 15 Ass. pl. 8, *John de Derbie's Case*, a manor made corpus prebend'. The fifth clause stands upon two branches:

"1. For the better maintenance and continuance of the said hospital, etc., and that the same may take the better effect, and that the revenues may be the better governed and employed, there shall be sixteen governors."

It names fifteen of them by express names,

"and such person as from time to time shall be master, to be the first and present governors. 2. And the said persons and their successors, by the name of the governors of the lands, etc., one body incorporate and politic, by that name to have perpetual succession for ever to endure, we do by these presents for ever hereafter really and fully incorporate."

The words of this clause are verba operativa. It is to be known that every corporation, or body politic, or incorporate, which are all one, either stands upon one sole person, as the King, bishop, parson, etc., or aggregate of many, as mayor, commonalty, dean and chapter, etc., and these are in the civil law called universitas sive collegium.

It is to be seen what things are of the essence of a corporation. First, lawful authority of incorporation; and that may be by four means, sc. by the common law, as the King himself, etc.; by authority of Parliament; by the King's charter (as in this case); and by prescription. The second which is of the essence of the incorporation, are persons to be incorporated, and that in two manners, sc. persons natural, or bodies incorporate and political. Thirdly, a name by which they are incorporated; as in this case governors of the lands, etc. Fourthly, of a place, for without a place no incorporation can be made; here the place is the Charterhouse in the county of Middlesex. Vide 3 Hen. 6, Det. 20; 17 Edw. 3, 59 B. and 45 Edw. 3, 17. Fifthly, by words sufficient in law, but not restrained to any certain, legal, and prescript form of words. Forasmuch as good pleading is lapis Lydius, the touchstone of the true sense and knowledge of the common law, the form of pleading of a corporation by prescription is to be observed, for in such case he ought to prescribe in everything which is of the essence of the incorporation. In

the Book of Entries, tit., Quare impedit 1; the pleading is, quoddam hospitale Sanctæ Mariæ de Bristow de uno magistro, et conventu a toto tempore, etc., incorporat' fuerunt per nomen magistri et conventus hospitalis Sanct' Mariæ de Bristow; and there it appears that there they purchased lands and tenements and were impleaded without any prescription for the one or the other, because when they are incorporated by prescription by a certain name, then to implead and to be impleaded, to grant and purchase, etc., are incidents to a body incorporate. Michaelmas 15 Hen. 7, Rot. 522 in the Common Pleas, there the prescription is custos et vicarii collegii vicariorum in choro Hereford sunt et a toto tempore, etc., fuerunt incorporat' per nomen custodis et vicar' collegii vicariorum in choro Hereford': and there also they purchased and were impleaded as incidents to incorporation. [Rastell's Entries] Liber intrat' tit. Ass., fol. 68. Magister, fratres, et sorores fraternitatis sive guildæ novem ordinum sanctorum angelorum juxta Brainford brought an assise. The tenant pleads, quod in villa de Brainford est quædam fraternitas incorporata infra tempus memoriæ de magistro, fratribus et sororibus novem ordinum angelorum juxta Brainford bridge, absque hoc quod habetur aliqua talis fraternitas. Which case is reported in 22 Edw. 4, 34, a., where the tenant at first pleaded no such corporation, and, if it be, not found, and naught because two bars, and then he pleaded the said plea, quod est quædam fraternitas incorporata, etc., and yet there they were infeoffed by Bocking upon condition, and capable thereof as incident to incorporation.

Therewith agrees the *Bishop of Exeter's Case* in the Book of Entries, 455; 2 Hen. 7, 17, b., the corporation of Godmanchester; 34 Hen. 6, 27, a. b., in the case of the hospital of Wycome. Vide 26 Hen. 8, 1 b. In 9 Edw. 4, 20 a., the master of the hospital of Burton St. Lazarus prescribed, quod ipse et omnes prædecessores sui magistri hospitalis prædict' a toto tempore, etc., nominati et cogniti fuerunt, etc., tam per nomen magistri hospitalis Sancti Lazari de Burton, de ordine Sancti Lazari de Jerusalem in Angliâ, quam per nomen magistri de Burton Sancti Lazari de Jerusalem in Angliâ: by which it appears that this word incorporo, or any derivative thereof, is not in law requisite to create an incorporation; but other equivalent words are sufficient, as here nominati et cogniti. Therewith agree 44 Ass. pl. 9, in the *Prior of Plimpton's Case*, and 4 Edw. 4, 7 b., in the *Abbot of Glastonbury's Case*, and in none of these books or records was any mention made of these words, fundo, erigo, etc., or any other like words, for, as it has been said, they are only declaratory words, and the effect of them may be done by the owner of the land without any grant. It was well observed that in olden times the inhabitants or burgesses of a town or borough were incorporated when the King granted to them to have gildam mercatoriam. In the Register 219 b., where the writ recites, quod cum inter cæteras libertates civibus civitatis Winton' per chartas progenitorum nostrorum quondam Regûm Angliæ quas per chartam nostram confirmavimus, concessum sit eisdem, quod nullus eorum qui fuerunt infra gildam mercatoriam placitet extra murum, etc., where gilda signifies contubernium seu fraternitas incorporata; and upon that the place of their meeting and assemblies was called the Guildhall. I have seen the charter made by King Henry I, Textoribus Lond', by which he grants to them that they shall have gildam mercatoriam, and a confirmation of it made by King Henry II, by which charters they were incorporated. Where the opinion of Fineux in 13 Hen. 8, 3 b. and of Prisot in 39 Hen. 6, 13 b., was cited at the Bar, that a corporation aggregate of many cannot be a body only without a head, that was utterly denied, for at first the greater part of corporations were bodies without any head by force of these words gilda mercatoria. That a corporation may be aggregate of many without a head, vide 18 Edw. 2, Annuity 48; 5 Edw. 3, 11 b.; 22 Ass. 67; 29 Ass. 17; 2 Hen. 6, 9; 18 Hen. 6, 16 a. b.; 19 Hen. 6, 80; 21 Edw. 4, 55 b., 56 a. b.; 7 Edw. 4, 14 a. b.; 2 Dyer, 100. And it appears by record that Paulinus, the first Archbishop of York, after he had baptised the inhabitants of Nottinghamshire in the river of Trent, founded a collegiate church in Southwell of prebendaries consecrated to the Virgin Mary, which continues a body without a head even to this day.

Vide for this word "guild" or fraternity in the Book of Entries 68; 37 Edw. 3, c. 5; 15 Rich. 2, c. 5 [Mortmain: repealed]; the statute of 1 Edw. 6, of chantries [c. 14: Dissolution of Colleges (1547); repealed by Charities Act, 1960]. In which three things were observed. (i) How prudens antiquitas did always comprehend much matter in a narrow room. (ii) That to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words. (iii) That when a corporation is duly created, all other incidents are tacite annexed. For direct authority in this point in 22 Edw. 4, Grants 30, it is held by Brian, C.J., and Choke, J., that corporation is sufficient without the words to implead and to be impleaded, etc., and, therefore, divers clauses subsequent in the charters are not of necessity, but only declaratory, and might well have been left out. As 1. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alienate, etc., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc., that is also declaratory, for when they are incorporated, they may make or use what seal they will. 4. To restrain them from alienating or demising but in certain form; that is an ordinance testifying the King's desire, but it is but a precept, and does not bind in law. 5. That the survivors shall be the corporation, that is a good clause to oust doubts and questions which might arise, the number being certain. 6. If the revenues increase, that they shall be employed to increase the number of poor, etc., that is but explanatory, as appears in the *Thetford School Case* (4). To be visited by the governors, etc., that is also explanatory; for in this case the poor which shall be resident in the house of the Charterhouse shall not be incorporated, but certain persons in whom the possessions are vested, who shall not be resident there, but only to have the general government and ordering of the poor therein, so that this case is out of the statutes of 2 Hen. 5, St. 1, c. 1 [visitation of Hospitals: repealed S.L.R. 1948] and 14 Eliz., c. 5 [Vagabonds, etc.: repealed S.L.R. 1863], for if no visitor had been appointed by the charter, the governors should visit; and the books in 8 Edw. 3, 28 and 8 Ass. 29, do not gainsay it, where it is held that, if the hospital be lay, the patron shall visit, and if spiritual, the bishop shall visit, so that every hospital is visitable; it is true, but in the case at the Bar the poor of the hospital are not incorporated, and so no legal hospital. 8. To make ordinances; that is requisite for the good order and government of the poor, etc., but not to the essence of the incorporation. 9. The exemption from the ordinary is but declaratory, for being a lay incorporation he neither can nor ought to visit. 10. The licence to purchase in mortmain is necessary for the maintenance and support of the poor, etc., for without revenues they cannot live, and without a licence in mortmain they cannot lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it, so that by what has been said, it appears what things in genere are requisite to a complete body incorporate, and which are verba operativa in this case (which are necessary to be known in every case), in the resolution whereof it appears how necessary it is that the law and experience should join with their hands together.

As to the fifth objection, that no incorporation was made immediately as the letters patent import, nor can be until the master was named, and, therefore, the charter is repugnant and void. To that it was answered that this objection extends to the subversion of a great number of incorporations, for when a corporation is created by letters patent, by the same patent power is given to the body to choose a mayor, aldermen, or bailiffs, or governors, or the like, and yet they are immediately incorporated by the same letters patent; and therewith expressly agree 2 Plowd. 532 b. in *Croft* v. *Howel* (5); 21 Edw. 4, 59 b. and 3 Hen. 7, Grant, 36, vouched at large before to first and second objections. Vide 32 Edw. 3, Aid. 39; 13 Edw. 4, b.; 16 Edw. 3, Grant 65. It is true that it is immediately by the letters patent a corporation in abstracto, but not in concreto, until the naming of the master. A case adjudged in the King's Bench, Michaelmas 34 & 35 Eliz., Rot. 173, coram rege was strongly urged. The governors of the possessions, revenues

and goods hospitalis Edward' Regis Angliæ Sexti brought a bill of debt of twenty pounds against Elias Germaine. The defendant pleaded that King Edward VI, reciting the care of the city of London for the relief of poor men and infants, concessit majori, civib' et communitati Lond' domum mansionalem vocat' Bridewell, etc., and there the King declared his intent that Bridewell should be founded, erected, etc., a hospital for the said poor, etc., idem Rex ut intentio sua melior' capiat effectum, and to the end the land which should be granted to them should be better governed, per easd' literas patentes voluit et ordinavit quod hosp' præd' cum sic fundat' erect' et stabilit' fuer' hospital' Edward VI Reg' Angl. Christi Bridewell, et S. Tho. Apost' nominetur et appelletur imperpetuum, et quod major' communitas et cives civitat' præd' forent Gubernatores, etc., et quod iidem Gubern' de cætero essent et forent un' corpus corporat' per nomen Gubernat' posses' reventionum et bona' hospital E. Reg' Angl' Christi Bridew. et St. Th' Apost', etc., and further pleaded, quod nullum hospital' quale in eisd' lit' pat' mentionat' post confect' præd' literarum pat' sic fundat', erect' et stabilit' fuit, etc. On which the plaintiff demurred, and upon argument at the Bar and Bench it was adjudged for the plaintiff. For the said ordinance that the said house should be a hospital cum sic fundat' etc., fuer' is intended only of the mechanical part of an actual hospital, sc. of the fitting and finishing of the hospital house with poor, etc.

This hospital in intention only is sufficient to support the name of a corporation, and the words de præsenti, sc., quod iid' gubernat' de cætero essent et forent un' corpus corporat' per nomen, etc., do in law incorporate them presently, and shall not stay until there be an actual hospital, or until the house be fitted or furnished, which is the mechanical part of the hospital, sc., for the habitation of the poor; which is the first thing to be observed by the said judgment: vide 32 Edw. 3, Aid. 39. King Edward III newly founded a priory, and granted to the monks that they might choose a prior, and before the prior was chosen W. made a lease to one A. for life, the remainder to the prior and convent. In a scire facias against A. he pleaded that W. was seised in fee and leased to A. the remainder to the prior and convent who were newly founded by the King and because there was not yet a prior, the right was in the King until, and prayed aid of the King and the aid by award was granted, and a writ of procedendo came, and then A., the defendant, showed, that after the aid granted there was a prior made and ordained in whom the right remained, and prayed in aid of the prior; and he was ousted of the aid because he had aid before, which proves that the remainder in such case is good. The second thing to be observed in the said judgment in the said case of the hospital of Bridewell is that one corporation may be made out of another corporation, sc. the mayor, citizens and commonalty of London are created in their politic capacity governors, etc., of the hospital of Bridewell, 9 Edw. 3, 18 b. Many corporations may be created one out of another, as the dean and chapter of Lincoln are a joint corporation, the dean by himself is a corporation, and every of the prebends is a corporation by himself, and in a case so manifest this shall suffice.

As to the sixth objection, that until a hospital be founded there can be no incorporation, for then they would be idle and mathematical governors, it was answered that there was a hospital in potestate, and a hospital in exec', also a hospital in potentia and a hospital actu, a hospital re, and a hospital nomine. As to the creation of an incorporation, a hospital potestate, potentia, seu nomine suffices, as one may by letters patent be governor of an army before there be an army: vide 17 Hen. 6, Protection 56. That agrees with philosophy and reason. Arist. Lib. 3, De generatione, says, quod caro gignit carnem, and that is true in potestate, but not actu. So a fowl as soon as it is hatched is volatilis a volando, quia habet potest' volandi, quanquam act' volandi non habet: so a child as soon as he is born is called rationalis, because he has potestam, although he has not, and perhaps never will have, rationem actu. This is also proved by old records and our books also, as in the Book of Entries, tit. Annuit, 32, 33 Hen. 5, quandam domum in quodam loco sive solo apud Shene (and abuts and bounds the soil) quam vocari et nuncupari

voluit Domum Jesu de Bethlem de Shene, duxit ordinand' et fundand' et domum illam quant' in ipso fuit fundavit et erexit (which was but a nominative house, for none was then built) et idcirco locum et sol' præd' de Shene ut primar' fundationem dedit, etc., by which it appears that a void place or soil in which a house is intended to be built, may by the King's charter be named a house, and this nominative house shall be sufficient, as there it was, to support the name of the incorporation. Also it appears by MATTHEW PARIS 64, etc., Polidore Virg' Chronic' Chronicor', etc. The hospital of St. John of Jerusal' in Anglia was incorporated in 1413–14 and that of the Templars, by the name of Magister milit' Templi et confratres sui in Ang' in 1123–24, and yet neither the fabric of the Temple nor the house of the hospital was founded and built, sed regnante Henry II of the one Jord' Biset homo pius et bene nummatus, and of the other Heraclius, patriarch of Jerusalem, were founders. Vide CAMDEN'S BRITANNIA 311, which proves that a void place to support the name of a corporation may by the King's charter be named a hospital or temple, and it is not requisite that there be always truth in the name of the corporation either of a hospital or of any other body politic. King Henry VIII in 1510–11 according to the will of King Henry VII granted to divers bishops, Thomas Earl Arundel, etc., John Fineux and Rob. Read, C.JJ., John Yonge, M.R., etc., who were executors of Henry VII quandam peciam terræ vocat' le Savoy in the parishes of St. Clements and St. Mary le Strand ad intentionem quod iidem quoddam hospital' in et super præd' peciam terræ vocat' Savoy erigere, fundare et estabilire possint, 4 Henry 8. The King licensed them quodd' hospit' de uno magistro et 5 capellanis super prædict' peciam terr' vocat' le Savoy fundare, et hospitale cum sic fundation' fuerit, should be incorporated by the name Magister et Capallanorum hospital' H. nuper Regis Angliæ 7 de Savoy; and yet in truth it was not a hospital in the time of Henry VII but in intention only; and yet the King in his charter called it the hospital of King Henry VII. It was admitted to be a good name of incorporation by all those who argued *Mariot* v. *Mascal* (6) upon the incorporation of the said hospital, Trin. 30, Eliz. 2, in the Exchequer, where the case was adjudged, or in the Exchequer Chamber where it depended by writ of error. Therefore, in Y.B. 44 Edw. 3, 16 B., Regist. 23, there the corporation was Prior Hosp' S. Johan' Jerusal. in Anglia: and so 9 Edw. 4, 6, Hospitale S. Lazari de Jerusal' in Anglia, which suffices for the name of the corporation, although it be but a fiction, that either St. John (which was St. John the Evangelist) or Jerusalem was situate in England. So Magistri milit' Templi Jerusal' in Anglia; and in the REGISTER, Prior et frat' Sancti Mariæ de Monte Carmeli in Anglia: so I have seen a record, that Catharine the first wife of King Henry VIII had a licence to found a chantry by the name of the chantry de Monte Calvarie extra Algate Lond.

It is great reason that a hospital, etc., in expectancy or intendment, or nomination, should be sufficient to support the name of an incorporation when the corporation itself is only in abstracto, and rests only in intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. Therefore, in 39 Hen. 6, 13 B. 14, a dean and chapter cannot have predecessor or successor, 21 Edw. 4, 27 (72) A. and 30 Edw. 3, 15. They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person but by attorney, 33 Hen. 8, Br. Fealty. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear: 1 PLOWD. COM. 213 [*Duchy of Lancaster Case* (7)] and *Willion* v. *Berkley* (8), 1 PLOWD. COM. 245, it is not subject to imbecilities, death of the natural body, and divers other cases. A thing which is not in esse but in apparent expectancy is regarded in law, as a bishop who is elect before he be consecrated; an infant in his mother's womb before his birth, etc.; 5 Edw. 2, Bre. 80; 8 Edw. 2, Voucher 237; 38 Edw. 3, 30; 41 Edw. 3, 5; 11 Edw. 3, Qua impedit 158. So for the name of a corporation it is sufficient to name a place in England, by the name of Jerusalem, Mount Calvary, Mount Carmel, Bethlehem, etc., a fortiori, the name of a spacious and goodly house well and actually built by the name of a hospital is sufficient; for that imports truth and

certainty. By which it appears that in the case at Bar there was a lawful corporation of the governors, etc., created and instituted by the King's charter, and by consequence as well any person in England as Sutton, might give and grant to them before any foundation laid, or to be laid by Sutton (as it was imagined he ought to have done before they were capable, etc.), but that is clearly answered and confuted before; and in truth hæc recitasse est confutasse.

As to the seventh objection, it is to be known that in law there are two manner of foundations, one fundatio incipiens, the other fundatio perficiens, and, therefore, quatenus ad capacitatem et habilitatem, the incorporation is metaphorice called the foundation, for that is the beginning, as a foundation quasi fundamentum capacitatis, preceding the whole, and, therefore in Y.B. 21 Hen. 6, 4 a., a writ was brought against John Arden, abbot of St. John Baptist of Colchester. The defendant pleaded that before time of memory foundation was made of the same place per nomen Abbat. eccl' et monast' de S. Joh' de Colchester, etc., where foundation is taken for incorporation: 38 Edw. 3, 14; 38 Edw. 3, 28 a.; 20 Hen. 6 27 a. and 18 Hen. 6, 16 a. in the *Deans and Canons of Windsor's Case*, and divers other books agree with the same; sed quatenus ad dotationem, the first gift of the revenues is called the foundation, and he who gives it is the founder in law, for proprie fundatio est quasi fundi datio, and the first gift is fundamentum dotationis seu collationis, et appellatione fundi ædificium et ager continentur. That is proved by the Statute of Westminster the Second, c. 41: Si abbates, priores, custodes hospital' et aliarum domorum religiosarum fundatarum ab ipso Rege vel a progenitoribus suis alienaver' vel de cætero tenem' domibus ipsis ab ipso vel a progenitoribus suis collata, etc. In which was observed that in respect of tenements collated or given by the King, the house was said to be founded by the King, but more fully in the clause following in the said Act, si autem domus illa a comite, barone, vel ab aliis fundata fuerit, habeat ille a quo, etc., tenement' sic alienat' collat' fuer' br' e ad recuperand', etc., where the collation or gift of the tenements is called the foundation. And where the founder brings the said writ of contra formam collationis, the writ of Præcipe quod reddat mesuag' quod eid' domui collat' fuer'; vide 9 Hen. 7, 26; Fitzherbert's Natura Brevium 211, Old Natura Brevium 142; 38 Ass., p. 22. He who gives the first lands is the founder, quia fundare in that sense nihil al' est quam fundum dare, and therewith agrees 14 Edw. 3, Corrodie 5.

In a writ of prohibition where a common person is founder of a hospital the writ as appears in the Register 41 a. says, hospitale sancti egidii leprosorum de Burton per antecessor' R. filii I. ad sustentation' leprosorum et aliorum pauper' et infirmor' ibid' totum in temporal' et nihil in spiritual' fundat' existit, and ibid. 43, a., the like writ where the King is founder, cum hospitale nostr' sanctor' Innocentium juxta Lincoln' de fundatione progenitor' nostror' Regum Angliæ, etc., de terris et possessionibus pro sustentatione pauper' et infirmor' in eod' hospital' degentium dotatum existat. In which it was observed, that where the first writ says fundat' this writ calls it dotat' 39 Edw. 3, 17 b. The abbot of Lyra brought a scire facias against the dean of Woborn, where the dean said he held of the patronage (i.e., of the King's foundation) and prayed aid of him, and had aid; and there came a writ of procedendo, and it was challenged because the writ said of the patronage and not of the collation, and it was taken all one, 33 Edw. 3, Aid 103. The *Dean of Stafford's Case*, the deanery is said to be of the foundation, et paulo post of the collation of the King, 8 Edw. 3, 56. In *Sirach's Case*, by the foundation the land is amortised, vide 4 Edw. 3, Ass. 177; 21 Edw. 3, 60 a.; 24 Edw. 3, 33 b. 34 a.; 44 Edw. 3, 23; 44 Edw. 3, 11 b.; 2 Edw. 3, 28, the *Earl of Richmond's Case*; 6 Hen. 4, 5; 7 Edw. 4, 12. Therefore, it was resolved that, if the King had incorporated the poor of the said hospital, Sutton need not have made any instrument comprehending any foundation, erection, etc., but his gift of the land being the first gift had made him founder, and the very first donation is all the foundation which is requisite in law: and to the erection of a hospital, etc., there is not in law anything requisite, but incorporation and donation. In the report I have omitted all the arguments which were made at large on both sides on one common

ground, where one act at one instant shall enure to divers intents distinct in time, some holding that the bargain and sale amounts not only to a dotation, but also to a foundation, and others totis viribus e contra, for it appears to you now without question that the first dotation is the foundation. Yet in that also a difference is necessary to be well understood, sc. when the King expresses the words, designs the place, appoints the number, and gives them a name by his charter, so that it is a complete corporation; there the founder or donor has nothing to do but to make the dotation without any instrument comprehending these words, fundo, erigo, stabilio, etc., or other the like words, for the common person who is the founder in such case has nothing to do in the work of incorporation. But when the King by his charter reserves as well the nomination of the persons, as the name of the incorporation to a common person who shall be the founder, there he ought to name the parties, and declare by what name they shall be incorporated, and there many times, although it be superfluous, he uses these words, fundo, erigo etc., or such like, and when the common person has done it, and declared it in writing according to his authority, then they are incorporated by the King's letters patent, and not by the common person, for he is but an instrument, and the King makes the corporation in such case in the same manner as if all had been comprehended in the letters patent themselves, for it is true that none but the King alone can create or make a corporation, as it is held in 49 Edw. 3, 4, 4 A., 49 Lib. Ass. 8; but qui per alium facit, per se ipsum facere videtur. Vide for this difference 38 Edw. 3, 14 B.; 22 Edw. 1, Grant 30; 2 Hen. 7, 13 A. B. and tit. Grant 36, 20 Hen. 7, 7.

As to the eighth objection against the nomination of the master, it was resolved that it was good, for Sutton had liberty at his will and pleasure to nominate him, and when he is nominated, he is master by force of the said letters patent, and is now as if he had been named in and by the letters patent themselves at first; and the other part of the objection is answered before.

As to the objections against the bargain and sale, it was first resolved without question that money given by the governors or any of them as private persons, is a good consideration to grant the land to them in the politic capacity; but the indenture imports that they paid it as governors, and by such name they are acquitted by the indenture. Also there is twelve-pence rent reserved to Sutton and his heirs, which is a good consideration. Secondly, although in the habendum a trust is declared, that without question cannot make the bargain and sale void, but the conveyance being by bargain and sale, was wisely made to declare the confidence and trust. As to the third, that is clearly answered and resolved before.

As to the last objection, sc., that in pleading, these governors cannot plead that they were seised in jure hospitalis, because there was not any hospital incorporate nor in esse at the time of the incorporation. To that it was answered and resolved that the pleading should be that they were seised in their demesne as of fee in jure incorporationis suæ, and so it was pleaded in *Croft* v. *Howel* (5). Vide *Fulmerston* v. *Steward* (9) also. Vide 7 Edw. 3, fo. 51, pl. 28, the case of custos altaris, he counted that he was seised, etc., in jure altaris. As to the precedents which were shown, it was answered that there are many clauses inserted in charters as well of the King as others, ex consuetudine clericorum, which are not de necessitate legis, but some declaratory and explanatory, and some prolix and nugatory, but lex multa proficientia, et proficientia paucis comprehendit. All the judges who argued in this case (except the two aforesaid) concluded against the plaintiff, and those two mutata opinione assented also to the judgment, so that by the assent of all the said judges nullo contradicente judgment was given against the plaintiff. Lord Ellesmere, L.C., hearing all the arguments at the Bar and Bench agreed also in opinion with the judges, and so this great work of charity has tasted of such charity which ought to be in judges, which is declared in the Statute of Westminster the First, c. 51: Summa charitas est facere justitiam omnibus personis omni tempore quando necesse fuerit. There is a good rule for these governors, and all such corporations, which is expressed in the Statute De Templariis, 1324, in these words:

A "ta semper quod pia et celeberrima voluntas donatorum in omnibus teneatur et expleatur et perpetuo sanctissime perseveret."

Sir Thomas Fleming, Knt., after the first day this case was argued fell sick, of which sickness he afterwards died, so that he never argued this case. This Sir Thomas Fleming was first a Serjeant-at-Law, and afterwards Solicitor-General to
B Queen Elizabeth, and to the present King James I for the space of twelve years, and then was preferred to be Chief Baron of the Exchequer after the death of Sir William Periam, and afterwards advanced to be Chief Justice of England after the death of Sir John Popham all which places he discharged with great judgment, integrity and discretion, and he well deserved the good will of all that knew him, because he was of a sociable and a placable nature and disposition.

C I have reported this case the more at large for three reasons. (i) For the confirmation of incorporations founded for works of piety and charity in time past. (ii) For the better instruction how they which shall be founded hereafter shall be so established that no exception may be taken to them. (iii) For the resolving of certain opinions and questions which were moved at the Bar, and which might have disturbed the peace of the law. In the argument of this case many other authori-
D ties were cited, sc. 2 Edw. 3, 47; 3 Edw. 3, 83; 5 Edw. 3, 144; 7 Edw. 3, 57; 8 Edw. 3, 5; 8 Edw. 3, 67; 8 Edw. 3, 208; 18 Edw. 3, 1 [pl. 6, *Queen Philippa* v. *Chichester* (*Abbess*) (10)]; 20 Edw. 3, Nonabilite 9; 20 Edw. 3, Corone 225; 21 Edw. 3, 35; 32 Edw. 3, Aid 55; 40 Edw. 3, 28; 44 Ass. 2; 13 Rich. 2, Breve 643; 11 Hen. 4, 12, 19; 14 Hen. 4, 8; 3 Hen. 6, 28; 7 Hen. 6, 13; 9 Hen. 6, 13, 14, 16; 20 Hen. 6, 7; 21 Hen. 6, 2; 12 Edw. 4, 17; 15 Edw. 4, 1; 21 Edw. 4, 32, 55, 57;
E Lib. Int. 112; 6 Hen. 7, 14; 10 Hen. 7, 16; 11 Hen. 7, 9; 11 Hen. 7, 27; 13 Hen. 8, 13; 14 Hen. 8, 29; 32 Hen. 8, Br. Corp. 78; 1 Dyer, 98; 1 Dyer, 81a; *Graystock College Case*; 3 Dyer, 267 a., pl. 12, *Landewibrevye College Case*; 2 Plowd. Com. 494, *Grendon* v. *Bishop of Lincoln*; Hil. 16 Eliz. Rot. 495, *Sir Fr. Fleming's Case* in the Common Pleas.

F The names of the governors nominated by Sutton and expressed in the said charter were the most reverend father in God George, Archbishop of Canterbury, Thomas Lord Ellesmere, Lord Chancellor of England, Robert Earl of Salisbury, John Bishop of London, Lancelot Bishop of Ely, Sir Edward Coke, Knt., then Chief Justice of the Court of Common Pleas and now Lord Chief Justice of England, Sir Thomas Foster, one of the justices of the Court of Common Pleas, Sir Henry Hobart, then the King's Attorney-General and now Chief Justice of the Court of
G Common Pleas, John Overal, dean of the church of St. Paul in London, George Mountain, dean of Westminster, Henry Thursby, one of the Masters of the Chancery, Jeffery Nightingale, Richard Sutton, John Law, Thomas Brown, and the master of the said hospital for the time being. After the death of the said Sir Thomas Foster, one of the justices of the Court of Common Pleas (who was a grave and reverend judge, of great judgment, constancy and integrity), Sir James Altham,
H Kt., one of the barons of the Exchequer, was according to the said charter unanimi consensu chosen in his place. The said master of the hospital, whom Sutton had nominated durante bene placito, our Lord the King, after the death of Sutton, by his letters patent, has nominated for the term of his life.

A

MITCHEL *v.* REYNOLDS

[Court of Queen's Bench (Parker, C.J., and other judges), Hilary Term, 1711]

[Reported 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347]

B

Contract—Illegality—Public policy—Restraint of trade—Sale of lease of bakery—Bond of vendor not to trade as baker within same parish—Reasonableness of restraint.

A bond or promise to restrain oneself from trading in a particular place is good if it be made for reasonable consideration, but such a bond or promise is void if there be no reasonable consideration. A bond or promise to restrain a man from trading at all is void.

C

The defendant, having assigned to the plaintiff the lease of a bakehouse in a certain parish for a term of five years, bound himself not to exercise the trade of a baker within the parish during the term, or, if he did, then to pay to the plaintiff the sum of £50 when the bond should be void. In an action to enforce the bond, the defendant having set up as a baker in the same parish,

D

Held: the bond was a just and honest contract made for reasonable consideration and ought to be maintained.

Notes. Applied: *Gunmakers Society* v. *Fell* (1742), Willes, 384; *Davis* v. *Mason* (1793), 5 Term Rep. 118; *Hayward* v. *Young* (1818), 2 Chit. 407; *Horner* v. *Graves*, [1824–34] All E.R.Rep. 475; *Young* v. *Timmins* (1831), 1 Cr. & J. 331; *Wallis* v. *Day*, [1835–42] All E.R.Rep. 426; *Ward* v. *Byrne* (1837), 2 M. & W. 273; *Catt* v. *Tourle* (1869), 4 Ch. App. 654; *Gravely* v. *Barnard* (1874), L.R. 18 Eq. 518. Considered: *Davies* v. *Davies* (1887), 36 Ch.D. 359; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd.*, [1891–4] All E.R.Rep. 1; *Haynes* v. *Doman*, [1899] 2 Ch. 13; *Re Hollis' Hospital Trustees and Hague's Contract* (1899), 47 W.R. 691. Applied: *Dowden and Pook* v. *Pook*, [1904] 1 K.B. 45. Approved: *Herbert Morris, Ltd.* v. *Saxelby*, [1916–17] All E.R.Rep. 305. Considered: *Palmolive Co. (of England)* v. *Freedman*, [1928] 1 Ch. 264. Referred to: *Chesman* v. *Nainby* (1727), 2 Stra. 739; *Low* v. *Peers* (1770), Wilm. 364; *Gale* v. *Reed* (1806), 8 East, 80; *Homer* v. *Ashford* (1825), 3 Bing. 322; *Wickens* v. *Evans* (1829), 3 Y. & J. 318; *Keppell* v. *Bailey*, [1824–34] All E.R.Rep. 10; *Hitchcock* v. *Coker*, [1835–42] All E.R.Rep. 452; *Mallan* v. *May* (1843), 11 M. & W. 653; *Tallis* v. *Tallis* (1853), 1 E. & B. 391; *Dendy* v. *Henderson* (1855), 11 Exch. 194; *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351; *Clegg* v. *Hands* (1889), 44 Ch.D. 506, n.; *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1891–4] All E.R.Rep. 263; *Badische Anilin und Soda Fabrik* v. *Scholt, Segner*, [1892] 3 Ch. 447; *Mouchel* v. *Cubitt* (1907), 24 R.P.C. 194; *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1912), 107 L.T. 439; *Horwood* v. *Millar's Timber and Trading Co.*, [1916–17] All E.R.Rep. 847; *Rodriguez* v. *Speyer Bros.*, [1918–19] All E.R.Rep. 884; *Hepworth Manufacturing Co., Ltd.* v. *Ryott*, [1918–19] All E.R.Rep. 1019; *English Hop Growers, Ltd.* v. *Dering*, [1928] All E.R.Rep. 396; *Gilford Motor Co., Ltd.* v. *Horne*, [1933] All E.R.Rep. 109; *Empire Meat Co.* v. *Patrick*, [1939] 2 All E.R. 85; *Faramus* v. *Film Artistes' Association*, [1963] 1 All E.R. 636; *Petrofina (Great Britain) Ltd.* v. *Martin*, [1966] 1 All E.R. 126.

E F G H

As to restraint of trade by agreement generally, see 38 Halsbury's Laws (3rd Edn.) 15 et seq.; and for cases see 45 Digest (Repl.) 441 et seq.

I

Cases referred to:

(1) *City of London Case* (1610), 8 Co. Rep. 121 b; 77 E.R. 658; 45 Digest (Repl.) 383, *17*.

(2) *Darcy* v. *Allen* (*or Allin*) (1602), Moore, K.B. 671; 1 Web. Pat. Cas. 1; Noy, 173; 72 E.R. 830; sub nom. *Case of Monopolies*, 11 Co. Rep. 84b; 77 E.R. 1260; 45 Digest (Repl.) 391, *85*.

(3) *Weavers in London Corpn.* v. *Brown* (1601), Cro. Eliz. 803.

(4) *Farmer and Brooks Case* (1589), 1 Leon. 142; Owen, 67; 74 E.R. 132; 36 Digest (Repl.) 252, *35.*

(5) *Hix* v. *Gardiner* (1614), 2 Bulst. 195; 80 E.R. 1062; 17 Digest (Repl.) 12, *100.*

(6) *Ipswich Tailors' Case* (1614), 11 Co. Rep. 53a; 77 E.R. 1218; sub nom. *Ipswich Tailors* v. *Sherring*, 1 Roll. Rep. 4; sub nom. *Ipswich Clothworkers*, Godb. 252; 45 Digest (Repl.) 391, *86.*

(7) *Colchester Corpn.* v. *Goodwin* (1667), Cart. 68, 114; 24 E.R. 829, 859; 38 Digest (Repl.) 167, *55.*

(8) *Norris* v. *Staps* (*or Stapes*) (1616), Hob. 210; Hut. 5; 80 E.R. 357; 123 E.R. 1060; 45 Digest (Repl.) 392, *98.*

(9) *Franklin* v. *Green* (1604), 1 Bulst. 11.

(10) *Mounger* v. *Clare* (1677), 3 Keb. 808.

(11) *Davenant* v. *Hurdis* (1598), Moore, K.B. 576; cited in 11 Co. Rep. 86a; 72 E.R. 769; 13 Digest (Repl.) 241, *665.*

(12) *Player* v. *Jenkins* (1666), 1 Sid. 284; 2 Keb. 27; 82 E.R. 1108; 13 Digest (Repl.) 245, *719.*

(13) *Player* v. *Vere* (1679), T.Raym. 288, 324; 83 E.R. 149, 168; 13 Digest (Repl.) 246, *726.*

(14) *Player* v. *Gardner* (1672), 2 Keb. 873; 84 E.R. 552; 13 Digest (Repl.) 245, *718.*

(15) *Chamberlain of London's Case* (1590), 5 Co. Rep. 62 b.

(16) *Freemantle* v. *Silk Throwsters' Co.* (1668), 1 Lev. 229; 83 E.R. 382; sub nom. *Silk Throusters* (*Master, etc.*) v. *Fremantle*, 2 Keb. 309; 13 Digest (Repl.) 245, *716.*

(17) *Broad* v. *Jollyfe* (1620), Cro. Jac. 596; 79 E.R. 509; sub nom. *Jollie* v. *Broads*, 2 Roll. Rep. 201; sub nom. *Joliffe* v. *Brode*, W.Jo. 13; sub nom. *Jelliet* v. *Broad*, Noy, 98; 45 Digest (Repl.) 465, *511.*

(18) *Rogers* v. *Parrey* (1613), 2 Bulst. 136; 80 E.R. 1012; 45 Digest (Repl.) 464, *479.*

(19) *Prugnell* v. *Gosse* (1648), Aleyn, 67; 82 E.R. 919; 45 Digest (Repl.) 465, *515.*

(20) *Anon.* (1577), Moore, K.B. 115; 72 E.R. 477; 45 Digest (Repl.) 497, *836.*

(21) *Anon.* (1587), 2 Leon. 210; Moore, K.B. 242; 74 E.R. 485; 45 Digest (Repl.) 504, *916.*

(22) *Colgate* v. *Bacheler* (1602), Cro. Eliz. 872; 78 E.R. 1097; sub nom. *Claygate* v. *Batchelor*, Owen, 143; 45 Digest (Repl.) 497, *837.*

(23) *Ferby* v. *Arrosmyth* (1668), 2 Keb. 377.

(24) *Barrow* v. *Wood* (1643), March, 191; 82 E.R. 470; 45 Digest (Repl.) 508, *953.*

(25) *Thompson* v. *Harvey* (1688), 1 Show 2; Comb. 121; Holt, K.B. 674; 89 E.R. 408; 45 Digest (Repl.) 489, *768.*

(26) *Hunlocke* v. *Blacklowe* (1670), 2 Saund. 156; 2 Keb. 674; 85 E.R. 893; sub nom. *Humlock* v. *Blacklaw*, 1 Sid. 464; 1 Mod. Rep. 64; 12 Digest (Repl.) 471, *3512.*

(27) *Bragge* v. *Stanner* (1621), Palm. 172; 81 E.R. 1031; 45 Digest (Repl.) 497, *838.*

(28) *Anon.* (1641), March, 77; 82 E.R. 419; 45 Digest (Repl.) 507, *952.*

(29) *Norton* v. *Simmes* (1614), Hob. 12; Moore, K.B. 856; 80 E.R. 163; 41 Digest (Repl.) 79, *33.*

(30) *Thrower* v. *Whetstone* (1555), 2 Dyer, 118 b.

(31) *Clerk* v. *Taylors of Exeter* (*Governor & Co.*) (1685), 3 Lev. 241; 83 E.R. 670, Ex. Ch.; 45 Digest (Repl.) 451, *318.*

(32) *Hardy* v. *Martin* (1783), 1 Eq. Cas. Abr. 26; 1 Bro.C.C. 419, n.; 29 E.R. 1046; 7 Digest (Repl.) 257, *961.*

Action of debt on a bond.

The defendant prayed oyer of the condition which recited that whereas the

defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's Holborn, for the term of five years, if the defendant should not exercise the trade of a baker within that parish during the said term, or, if he did, should within three days after proof thereof made, pay to the plaintiff the sum of £50, then the said obligation was to be void. Quibus lectis et auditis [Which, having been read and heard], he pleaded that he was a baker by trade, that he had served an apprenticeship to it, ratione cujus [by reason of which] the bond was void in law, per quod [wherefore] he did trade prout ei bene licuit [as he lawfully might]. Whereupon the plaintiff demurred in law.

PARKER, C.J., delivered the resolution of the court: The general question on this record is whether this bond, being made in restraint of trade, be good. We are all of opinion that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the bond is good. The true distinction of this case is not between promises and bonds, but between contracts with and without considerations, and whenever a sufficient consideration appears to make it a proper and a useful contract and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.

As the resolutions of the books on those contracts seem to disagree, I will endeavour to state the law on this head and to reconcile the jarring opinions. In order to do so I shall proceed in the following method. First, give a general view of the cases relating to the restraint of trade; secondly, make some observations from them; thirdly, show the reasons of the differences which are to be found in these cases; and fourthly, apply the whole to the present case.

As to the cases, they are either of involuntary contracts, against or without a man's own consent, or of voluntary restraints by agreement of the parties. Involuntary restraints may be reduced under these heads: (i) grants or charters from the Crown; (ii) customs; (iii) byelaws.

Grants or charters from the Crown may be, first, a new charter of incorporation to trade generally, exclusive of all others, and this is void: *City of London Case* (1). Secondly, a grant to particular persons for the sole exercise of any known trade. This also is void because it is a monopoly and against the policy of the common law and contrary to Magna Carta: *Case of Monopolies* (2). Thirdly, a grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity. This, however, is tied up by the Statute of Monopolies, 1623, s. 6, to the term of fourteen years, for after that time it is presumed to be a known trade and to have spread itself among the people.

Restraints by custom are of three sorts. First, such as are for the benefit of some particular persons who are alleged to use a trade for the advantage of a community, which are good: 8 Co. Rep. 125 [*City of London Case* (1)]; Cro. Eliz. 803 [*Weavers in London Corpn.* v. *Brown* (3)]; *Farmers and Brooks Case* (4); Y.B. 22 Hen. 6, 14; *Hix* v. *Gardiner* (5); 1 Roll Abr. 561. Secondly, for the benefit of a community of persons who are not alleged, but supposed to use the trade in order to exclude foreigners. In 3 Dyer, 279 b; W. Jones, 162; *City of London Case* (1); 11 Co. Rep. 52 [*Ipswich Tailors' Case* (6)]; *Colchester Corpn.* v. *Goodwin* (7) they are held good. Thirdly, a custom may be good to restrain a trade in a particular place, although none are either supposed or alleged to use it, as in the case of *Rippon*, Register 105, 106.

Restraints of trade by byelaws are these several ways. First, to exclude foreigners, and this is good if only to enforce a precedent custom by a penalty: *Colchester Corpn.* v. *Goodwin* (7); 8 Co. Rep. 125 [*City of London Case* (1)]. But where there is no precedent custom, such byelaw is void: 1 Roll. Abr. 364; *Norris*

A v. *Staps* (8); *Franklin* v. *Green* (9); *Mounger* v. *Clare* (10) in 3 KEBLE 808 is misreported for there the defendants did not plead a custom to exclude foreigners but only generally to make byelaws, which was the ground of the resolution in that case. Secondly, all byelaws made to cramp trade in general are void: *Davenant* v. *Hurdis* (11); 2 INST. 47; *Franklin* v. *Green* (9). Thirdly, byelaws made to restrain trade in order to the better government and regulation of it are good in some cases, namely, if they are B for the benefit of the place, to avoid public inconveniences, nuisances, etc., or for the advantage of the trade and improvement of the commodity: *Player* v. *Jenkins* (12); *Player* v. *Vere* (13); *Player* v. *Gardner* (14); and *Chamberlain of London's Case* (15). The last case is on the byelaw for bringing all broad-cloth to Blackwell Hall, there to be viewed and marked, and to pay a penny per piece for marking. This was held a reasonable byelaw, and, indeed, it seems to be only a fixing of the C market, for one object of all markets is that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there. In 2 KEB. 309 (*Silk Throusters* (*Master, etc.*) v. *Fremantle* (16)) the case is on a byelaw for restraining silk-throwsters from using more than a certain number of spindles. There the byelaw would have been good if the reasons given for it had been true.

D Voluntary restraints by agreement of the parties, are either general or particular as to places or persons. General restraints are all void, whether by bond, covenant or promise etc., with or without consideration, and whether it be of the party's own trade or not: *Broad* v. *Jollyfe* (17); *Rogers* v. *Parrey* (18); *Prugnell* v. *Gosse* (19). Particular restraints are either with or without consideration. Those without consideration are all void by whatever sort of contract created: E Y.B. 2 Hen. 5, 5; *Anon.* (20); *Anon.* (21); *Colgate* v. *Bacheler* (22); *Jelliet* v. *Broad* (17); *Ferby* v. *Arrosmyth* (23); *Barrow* v. *Wood* (24); *Thompson* v. *Harvey* (25), not well reported in 1 Show. 2; *Hunlocke* v. *Blacklowe* (26).

As to particular restraints with consideration, where a contract for restraint of trade appears to be made on a good and adequate consideration, so as to make it a proper and useful contract, it is good: *Rogers* v. *Parrey* (18) (2 Bulst. 136). That F case is wrongly reported, as appears by the roll which I have caused to be searched; it is B.R.Trin. 11 Jac. 1, Rot. 223. The resolution of the judges was not grounded on its being a particular restraint, but on its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, although as they stand in the book, they do not seem material. In *Broad* v. *Jollyfe* (17) all the reasons are clearly stated, and indeed, all the books when carefully examined G seem to concur in the distinction of restraints general and restraints particular and with or without consideration, which stands on very good foundation—volenti non fit injuria. A man may, on a valuable consideration, by his own consent and for his own profit, give over his trade and part with it to another in a particular place.

In *Bragg* v. *Stanner* (27) the entering on the trade, and not whether the right of action accrued by bond, promise or covenant, was the consideration. See MARCH, H 77 (*Anon.* (28)); but more particularly ALEYN, 67, where there is a very remarkable case (*Prugnell* v. *Gosse* (19)) which lays down this distinction and puts it on the consideration and reason of the thing.

I come now to make some observations that may be useful in the understanding of these cases. They are: first, that to obtain the sole exercise of any known trade throughout England, is a complete monopoly and against the policy of the I law; secondly, that when restrained to particular places or persons (if lawfully and fairly obtained) the same is not a monopoly; thirdly, that since these restraints may be by custom and custom must have a good foundation, therefore the thing is not absolutely and, in itself, unlawful; fourthly, that it is lawful, on good consideration, for a man to part with his trade; fifthly, that since actions on the case are actions injuriarum, it has been always held that such actions will lie for a man's using a trade contrary to custom or his own agreement, for there he uses it injuriously; sixthly, that where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty; seventhly, that no man can contract not to

use his trade at all; eighthly, that a particular restraint is not good without just reason and consideration. A

I will now give the reasons of the differences which we find in the cases. As to involuntary restraints, the first reason why such of these as are created by grants and charters from the Crown and by byelaws generally are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of the subject. Another reason is drawn from Magna B Carta which is infringed by these acts of power. That statute says, nullus liber homo, etc., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, etc., and these words have been always taken to extend to freedom of trade. But none of the cases of customs, byelaws to enforce these customs and patents for the sole use of a new invented art, is within any of these reasons, for here no man is abridged of his liberty or disseised of his freehold. A custom is lex C loci, and foreigners have no pretence of right in a particular society, exempt from the laws of that society. As to new invented arts, nobody can be said to have a right to that which was not in being before and, therefore, it is but a reasonable reward to ingenuity and uncommon industry.

I shall show the reason of the differences in the case of voluntary restraint, negatively and affirmatively. First, negatively. The true reason of the disallow- D ance of these in any case is never drawn from Magna Carta, for a man may, voluntarily and by his own act, put himself out of the possession of his freehold; he may sell it or give it away at his pleasure. Secondly, neither is it a reason against them that they are contrary to the liberty of the subject, for a man may by his own consent for a valuable consideration, part with his liberty, as in the case of a covenant not to erect a mill on his own lands: J. JONES, 13 [sic., quære E *Joliffe* v. *Brode* (17)]; Y.B. 4 Edw. 3, 57. When any of these are at any time mentioned as reasons on the head of voluntary restraints, they are to be taken only as general instances of the favour and indulgence of the law to trade and industry. It is not a reason against them that they are against law, I mean in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense are reducible under F one of these heads: (i) either to do something that is malum in se or malum prohibitum: 1 INST. 206; (ii) to omit the doing of something that is a duty: *Bragge* v. *Stanner* (27), *Norton* v. *Simmes* (29); (iii) to encourage such crimes and omissions: FITZ. ABR. tit. Obligation, 13; BRO. ABR. tit. Obligation, 34; *Thrower* v. *Whetstone* (30). Such conditions as these the law will always and without any regard to circumstances, defeat, being concerned to remove all temptations and induce- G ments to those crimes and, therefore, as in 1 INST. 206, a feoffment shall be absolute for an unlawful condition and a bond void. But from that I would infer that where there may be found a way to perform the condition without a breach of the law, it shall be good: *Norton* v. *Simmes* (29); CRO. CAR. 22; PERK. 228. Further, that all things prohibited by law may be restrained by condition, and, therefore, these particular restraints of trade, not being against law in a proper sense, as being H neither mala in se nor mala prohibita, and the law allowing them in some instances, as in those of customs and assumpsits, they may be restrained by condition.

Secondly, affirmatively. The true reasons of the distinction on which the judgments in these cases of voluntary restraints are founded, are the mischief which may arise from them, first to the party by the loss of his livelihood and the subsistence of his family; secondly, to the public, by depriving it of a useful member. I A second reason is the great abuses these voluntary restraints are liable to, as for instance, from corporations who are perpetually labouring for exclusive advantages in trade and to reduce it into as few hands as possible. Likewise from masters who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves. Again, in a great many instances they can be of no use to the obligee. This holds in all cases of general restraint throughout England, for what does it signify to a tradesman in

A London what another does at Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other. The Roman law would not enforce such contracts by an action: see PUFFENDORF, DE JURE NATURAE, lib. 5, c. 2, s. 3*; Y.B. 21 Hen. 7, 20.

The fourth reason is in favour of these contracts, and is that there may happen instances wherein they may be useful and beneficial, as to prevent a town from B being overstocked with any particular trade, or in the case of an old man finding himself in such circumstances either of body or mind that he is likely to be a loser by continuing his trade, it will be better for him to part with it for a consideration, that by selling his custom he may procure to himself a livelihood which he might probably have lost by trading longer.

Next, the law is not so unreasonable as to set aside a man's own agreement for C fear of an uncertain injury to him and fix a certain damage on another, as it must do if contracts with a consideration were made void: *Barrow* v. *Wood* (24); *Anon.* (28); Y.B. 7 Edw. 3, 65; *Prugnell* v. *Gosse* (19); *City of London Case* (1). Here, however, it may be made a question that, suppose it does not appear whether or not the contract be made on good consideration or be merely injurious and oppressive, what shall be done in this case? I do not see why that should not be shown D by pleading, although certainly the law might be settled either way without prejudice. As it now stands, however, the rule is that wherever such contract stat indifferenter, and for aught appears may be either good or bad, the law presumes it prima facie to be bad and for these reasons: (i) in favour of trade and honest industry. (ii) Because there plainly appears a mischief but the benefit (if any) can be only presumed, and in that case the presumptive benefit shall be over-borne E by the apparent mischief. (iii) Because the mischief (as I have shown before) is not only private but public. (iv) There is a sort of presumption that it is not of any benefit to the obligee himself because, it being a general mischief to the public, everybody is affected thereby. It is to be observed that although it be not shown to be the party's trade or livelihood or that he had no estate to subsist on, yet all the books condemn those bonds on that reason, namely, as taking away the F obligor's livelihood, which proves that the law presumes it and this presumption answers all the difficulties that are to be found in the books.

The fact that all contracts where there is a bare restraint of trade and no more must be void, but only where the consideration is not shown, can be no reason why, in cases where the special matter appears so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded and, G therefore, the courts of justice will enforce these latter contracts but not the former.

It answers the objection that a bond does not lack a consideration but is a perfect contract without it; for the law allows no action on a nudum pactum, but every contract must have a consideration either expressed as in assumpsits or implied as in bonds and covenants, but these latter, although they are perfect as to the form, yet may be void as to the matter, as in a covenant to stand seised which is void H without a consideration although it be a complete and perfect deed.

It shows why a contract not to trade in any part of England, although with consideration, is void, for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, although it may be to restrain him from trading in some, unless he intends a monopoly which is a crime.

I This shows why promises in restraint of trade have been held good, for in those contracts it is always necessary to show the consideration so that the presumption of injury could not take place, but it must be governed by the special matter shown. It also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases. It at least excuses the vehemence of HALL, J.,

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* The instances there mentioned are, that if any should agree not to wash their hands, or change their linen, for such a time, there could be no need to trouble a magistrate on the breach of such agreements, which would tend to no consequence when put in execution.

in Y.B. 2 Hen. 5, fo. 5, for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade and declare that he would not follow it any more, etc., at which instant some designing fellow should work him up to such a pitch as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family and the cries of his children, send him to the loom, should take advantage of the forfeiture and put the bond in suit, I must own that I think this such a piece of villainy as is hard to find a name for. I cannot but approve of the indignation that judge expressed, although not his manner* of expressing it. Surely it is not fit that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good but when it is reduced into the form of a bond, it immediately becomes void (for what reason, see *Clerk* v. *Taylors of Exeter* (*Governor & Co.*) (31)). A bond may be considered in two ways, either as a security or as a compensation. Why should it be void as a security? Can a man be bound too fast from doing an injury which I have proved the using of a trade contrary to custom or promise, to be.

Why should it be void as a compensation? Is there any reason why parties of full age and capable of contracting, may not settle the quantum of damages for such an injury? (Bract. lib. 3, c. 2, § 4.) It would be very strange that the law of England which delights so much in certainty, should make void a contract when reduced to certainty, which was good when loose and uncertain. (The cases in March's Rep. 77, 191 [*Anon.* (28) and *Barrow* v. *Wood* (24)], and also 1 Show. 2 [*Thompson* v. *Harvey* (25)] are but indifferently reported, and not warranted by the authorities they build on.)

One objection was that in a bond the whole penalty is to be recovered, but in assumpsit only the damages. But this objection holds equally against all bonds whatsoever.

Another objection was that this is like the case of an infant who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees. The answer is that the case of an infant stands on another reason, namely, a general disability to make a deed, but here both parties are capable. Neither is it the nature of the bond but merely the incapacity of the infant which makes a bond by him void, since there a surety would be liable; but it is otherwise here. Also the case of a sheriff is very different, because at common law he could take nothing for doing his duty, but the statute has given him certain fees, and he can neither take more, nor a chance for more, than that allows him.

It was further objected that a promise is good and a bond void, because the former leaves the matter more at large to be tried by a jury. But what is there to be tried by a jury in this case? It is to be tried whether, on consideration of the circumstances the contract be good or not, and that is a matter of law not fit for a jury to determine. It is to ascertain the damages; but cui bono (say they) should that be done? Is it for the benefit of the obligor? Certainly it may be necessary on that account for these reasons: First, a bond is a more favourable contract for him than a promise, for the penalty is a re-purchase of his trade ascertained beforehand,† and on payment thereof he shall have it again. He may choose to be bound not to do it under a penalty rather than not to do it at all. Secondly, however it be, it is his own act. Thirdly, he can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave. Fourthly, restraints by custom may (as I have proved) be enforced with penalties which are imposed without the party's consent—nay by

* Hall, J., expressed himself thus: "A ma intent vous purres aver demurre sur luy que le obligation est void, co que le condition est encountre common ley, et per Dieu si le plaintiff fuit icy, il irra al prison tanq; il ust fait fine au Roy."

† Sed vide *Hardy* v. *Martin* (32) (1 Bro.C.C. 419 note).

A the injured party without the concurrence of the other—and if so, then à fortiori he may bind himself by a penalty.

It may perhaps be objected that a false recital of a consideration in the condition may subject a man to an inconvenience which the law so much labours to prevent. But this is no more to be presumed than false testimony, and in such a case the defendant might aver against it; for although the rule be that a man is estopped B from averring against anything in his own deed, yet that is supposing it to be his deed. Where it is void it is otherwise, as in the case of an usurious contract.

The application of this to the case at Bar is very plain. Here there are set forth the particular circumstances and consideration on which the court is to judge whether it be a reasonable and useful contract. The plaintiff took a baker's house, and the question is whether he or the defendant shall have the trade in this neigh- C bourhood. The concern of the public is equal on both sides. What makes this the more reasonable is that the restraint is exactly proportioned to the consideration, i.e., the term of five years.

To conclude, in all restraints of trade where nothing more appears, the law presumes them bad; but if the circumstances are set forth that presumption is excluded and the court is to judge of those circumstances, and determine accordingly. If, D on them, it appears to be a just and honest contract, it ought to be maintained. For these reasons we are of opinion that the plaintiff ought to have judgment.

Judgment for plaintiff.

E

COLLINS *v.* BLANTERN

F [COURT OF COMMON PLEAS (Wilmot, C.J., Bathurst and Gould, JJ.), Hilary and Easter Terms, 1767]

[Reported 2 Wils. 341; 95 E.R. 847]

Contract—Illegality—Public policy—Interference with justice—Agreement by prosecutor to relinquish prosecution—Bond to secure payment—Extrinsic evidence to prove illegality.

G A contract designed to tempt a person to transgress the law is a contract injurious to the community, and is unlawful and cannot be enforced. Extrinsic evidence is admissible to prove the illegality of the consideration or of the purpose for which the contract was made.

Accordingly, a bond to secure a payment to one C. to enable him to pay a sum to R. in consideration that he (R.) would not appear to prosecute and H give evidence at the trial of certain named persons was **held** to be void and unenforceable, and evidence was admissible to prove the circumstances in which and purpose for which it had been given.

Notes. Followed: *Pole* v. *Harrobin* (1782), 9 East, 418, n. Considered: *Edgcombe* v. *Rodd* (1804), 5 East, 294. Followed: *Paxton* v. *Popham* (1808), 9 East, I 408. Considered: *Prole* v. *Wiggins* (1836), 3 Bing.N.C. 230. Followed: *Gas Light and Coke Co.* v. *Turner* (1839), 5 Bing.N.C. 666. Applied: *Kirwan* v. *Goodman* (1841), 9 Dowl. 330. Approved: *Kerr* v. *Leeman* (1844), 6 Q.B. 308. Considered: *Higgins* v. *Pitt* (1849), 4 Exch. 312. Applied: *Benyon* v. *Nettlefold* (1850), 3 Mac. & G. 94. Followed: *Taylor* v. *Chester*, [1861–73] All E.R.Rep. 154. Distinguished: *Waugh* v. *Morris* (1873), 42 L.J.Q.B. 57. Considered: *Bourke* v. *Mealy* (1879), 14 Cox, C.C. 329. Approved: *Kearley* v. *Thomson*, 1886–90] All E.R.Rep. 1055. Considered: *Barclay* v. *Pearson*, [1893] 2 Ch. 154. Applied: *Foster* v. *Driscoll*, *Lindsay* v. *Attfield*, *Lindsay* v. *Driscoll*, [1928] All E.R.Rep. 130.

Considered: *Wylie* v. *Lawrence Wright Music Co.* (1932), 96 J.P. 156; *Berg* v. *Sadler and Moore*, [1937] 2 K.B. 158. Referred to: *Drage* v. *Ibberson* (1798), 1 Esp. 643; *Fletcher* v. *Sondes* (1827), 1 Bli.N.S. 144; *Greville* v. *Atkins* (1829), 4 Man. & Ry.K.B. 372; *Edwards* v. *Brown* (1831), 1 Cr. & J. 307. *Hill* v. *Manchester and Salford Waterworks Co.* (1831), 2 B. & Ad. 544; *Ward* v. *Lloyd* (1843), 6 Man. & G. 785; *Keir* v. *Leeman* (1846), 9 Q.B. 371; *Reynell* v. *Sprye* (1852), 1 De G.M. & G. 660; *Royal British Bank* v. *Turquand* (1855), 5 E. & B. 248; *Rawlings* v. *Coal Consumers Association* (1874), 43 L.J.M.C. 111; *Hegarty* v. *Shine* (1878), 14 Cox, C.C. 124; *Yorkshire Ry. Waggon Co.* v. *Maclure and Cornwall Minerals Rail. Co.* (1881), 45 L.T. 747; *Re Coltman, Coltman* v. *Coltman* (1881), 45 L.T. 392; *Reichel* v. *Oxford* (1887), 35 Ch.D. 48; *Hermann* v. *Charlesworth* (1905), 74 L.J.K.B. 620; *Howard* v. *Odhams Press, Ltd.*, [1937] 2 All E.R. 509; *Bigos* v. *Bousted*, [1951] 1 All E.R. 92; *Lazarus Estates, Ltd.* v. *Beasley*, [1956] 1 All E.R. 341.

As to illegal bonds and contracts, see 3 Halsbury's Laws (3rd Edn.) 334–336, and ibid., vol. 8, pp. 125 et seq. For cases see 7 Digest (Repl.) 173 et seq., 12 Digest (Repl.) 263 et seq.

Cases referred to:

(1) *Bartlett* v. *Vinor* (1692), Carth. 251; Skin. 322; 90 E.R. 750; 12 Digest (Repl.) 304, *2336*.
(2) *Thompson* v. *Harvey* (1688), 1 Show. 2; Comb. 121; Holt, K.B. 674; 89 E.R. 408; 45 Digest (Repl.) 489, *768*.
(3) *Lady Downing* v. *Chapman* (1732), 9 East, 414, n.
(4) *Brook* v. *King* (1587), 1 Leon. 73; 74 E.R. 68; 7 Digest (Repl.) 172, *33*.
(5) *Jones' Case* (1589), 1 Leon. 203.
(6) *Foden* v. *Haines* (1693), Carth. 300; Comb. 245.
(7) *Empson* v. *Bathurst* (1622), Hut. 52.
(8) *Mauleverer* v. *Hawxby* (1670), 2 Saund. 78; 85 E.R. 748; sub nom. *Maleverer* v. *Hawksby*, 1 Sid. 456; 2 Keb. 625; sub nom. *Maleverer* v. *Redshaw*, 1 Vent. 39; 1 Mod. Rep. 35; 7 Digest (Repl.) 172, *30*.
(9) *Anon.* (1458), Jenk. 108; 145 E.R. 76; 7 Digest (Repl.) 177, *93*.
(10) *Lawrence* v. *Johns* (1611), Cro. Jac. 274; 79 E.R. 235; sub nom. *Johns* v. *Lawrence* (1610), Cro. Jac. 248, Ex. Ch.; 7 Digest (Repl.) 176, *86*.
(11) *Oldbury* v. *Gregory, Gregory* v. *Oldbury* (1599), Moore, K.B. 564; 72 E.R. 761; 19 Digest (Repl.) 417, *2246*.

Action for debt on a bond dated April 6, 1765.

Robert Blantern, late of Rodenhurst, in the county of Shropshire, yeoman, was summoned to answer Edward Collins of a plea that he render to him £700 which he owed to and unjustly detained from him. Collins alleged that whereas Blantern, on April 6, 1765, at Rodenhurst, by his certain writing obligatory acknowledged himself to be held and firmly bound unto him (Collins) in the aforesaid sum of £700, to be paid to him (Collins) when he should be thereunto required; nevertheless Blantern (although often thereunto required) had not paid the said £700 to him (Collins) but had refused to pay the same.

Blantern craved oyer of the said supposed writing obligatory, and it was read to him in these words:

"Know all men by these presents that we John Walker of Forton in the county of Stafford, yeoman, Thomas Walker of Draycott in the Moores in the said county of Stafford, yeoman, and Robert Blantern of Rodenhurst in the county of Salop, yeoman, are held and firmly bound to Edward Collins of Brecond in the said county of Stafford, surgeon, in the sum of £700 of good and lawful money of Great Britain, to be paid to the said Edward Collins, or his certain attorney, executors, administrators or assigns, for which payment, to be well and faithfully made, we bind ourselves and each and every of us jointly and severally, our and each and every of our heirs, executors and ad-

ministrators, firmly by these presents, sealed with our seals; dated April 6, 1765."

He also craved oyer of the condition to the said supposed writing obligatory, and it was read to him in these words:

"The condition of this obligation is such that if the above bounden John Walker, Thomas Walker, and Robert Blantern, our heirs executors or administrators, shall and do well and truly pay or cause to be paid unto the above named Edward Collins his executors, administrators or assigns, the full sum of £350 of good and lawful money of Great Britain upon the sixth day of May next, without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue."

The defendant pleaded that before and at the time of making the bond and the note after mentioned, two of the obligors, John and Thomas Walker and three others, stood indicted by John Rudge on indictments for wilful and corrupt perjury, and had severally pleaded Not Guilty. The several traverses on the indictments were at the time of making the unlawful agreement after mentioned, and the note and the said bond, viz., on the same day the bond was made, were about to come on to be tried at Stafford. Whereupon it was then corruptly agreed between Rudge, the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give the prosecutor Rudge his note for £350 in consideration that he (Rudge) would not appear to give evidence at the trial against any or either of the parties so standing indicted as aforesaid, and that the said John Walker, Thomas Walker, and Robert Blantern should seal, and as their deed deliver unto Collins, their bond or obligation of the same date with the said note in the penal sum of £700, with a condition thereunder written for the payment of £350 on May 6, 1765, as an indemnity to him, Collins, for the giving of such note. Blantern further said that in pursuance and in part of performance of the said unlawful, wicked and corrupt agreement, Collins did then and there, before the trial of the said traverses, or of any or either of them (to wit) on April 6, 1765, aforesaid, at Rodenhurst aforesaid, make, give and deliver unto the said John Rudge his certain note in writing, commonly called a promissory note bearing date as aforesaid, for the sum of £350 as for value received, payable to the said John Rudge one month after the date thereof, according to the tenor and effect of the agreement aforesaid, as a consideration for his, Rudge's, not appearing as prosecutor and for his not giving evidence as prosecutor on the trial of any or either of the traverses aforesaid against any or either of the parties so indicted as aforesaid, and that in pursuance of the said unlawful, wicked and corrupt agreement, and according to the tenor and effect thereof, Rudge then and there accepted the said note from Collins for the purpose aforesaid, and in part of performance of the aforesaid unlawful, wicked and corrupt agreement. In further pursuance and completion of the agreement, and according to the term and effect thereof, John Walker, Thomas Walker, and Robert Blantern did then and there immediately after the giving of the note, and before the trial of the traverses aforesaid, or of any or either of them (to wit) on April 6, 1765, seal, and as their deed deliver unto Collins the writing now brought into court with the condition above specified, as an indemnity to him, Collins, for the giving of such note so given for the cause aforesaid. The defendant averred that the bond was given for the said consideration, and no other, and that the obligors were not indebted to the plaintiff, and therefore the bond was void in law, et hoc. To these pleas the plaintiff demurred.

The case was argued in Hilary Term, 1767, by *Serjeant Nares* for the plaintiff and *Serjeant Glynn* for the defendant, and in Easter Term by *Serjeant Burland* for the plaintiff, and *Serjeant Jephson* for the defendant.

On the side of the plaintiff it was argued that the condition of the bond being singly for the payment of a sum of money, the bond was good and lawful, and that

no averment should be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it, and therefore that the special plea was bad. These cases were cited for the plaintiff: *Bartlett* v. *Vinor* (1); *Thompson* v. *Harvey* (2) (Comb. 121); *Lady Downing* v. *Chapman* (3); *Brook* v. *King* (4); *Jones' Case* (5); JENK. 106 [sic., but see p. 108 Case IX, *Anon.* (9)]; *Foden* v. *Haines* (6); *Empson* v. *Bathurst* (7); *Maleverer* v. *Redshaw* (8), VENT. 331; *Johns* v. *Lawrence* (10).

For the defendant it was argued that the averment of the wicked and unlawful consideration of giving the bond might well be pleaded, although it did not appear on the face of the deed, and that anything which showed an obligation to be void, might be averred, although it did not appear on the face of the bond, as duress; that it was delivered as an escrow to be delivered on a certain condition to the obligee. Although it was said there was a difference between bonds being void at common law and by statute, yet it was otherwise, for the common law was originally by statutes which were now not in being. The general rule that you could not plead any matter dehors the deed, did not apply to this case. The true meaning of that rule was that you could not allege anything inconsistent with and contrary to the deed, but you might allege matter consistent with the deed. The bond in the present case was for the payment of money. The plea admitted this, and the averment alleged upon what consideration that money was to be paid. Therefore, it was not inconsistent or contradictory to the condition of the bond. *Lady Downing* v. *Chapman* (3) was not like this case. That was an averment contradictory to the condition of the bond and amounted to a defeasance, the present condition was consistent with the condition which was for payment of money, and only showed the bad consideration upon which the money was to be paid.

LORD WILMOT, C.J., on the first argument, broke the case, and said that this was very different from *Lady Downing* v. *Chapman* (3), and he would consider it wholly independent thereof. As he was then advised, he thought there was no difference between an act being void by statute or by the common law. The principle the judges theretofore had gone upon for making the distinction was not a sound one, for wherever a bond was void at law or by statute, you might show how it was void by plea, and that in truth it never had any legal existence. The statute law was the will of the legislature in writing; the common law was nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it was now law by usage or writing, it was the same thing. A statute said that such a thing should be avoided by plea; why, therefore, might not a deed executed upon consideration against the common law be avoided by plea? In duress, simony, infancy, coverture, etc., the plea discloses that in truth there never was any obligation. The principle on which courts of justice must go upon was to enforce the performance of contracts not injurious to society, and it would be absurd to say that a court of justice should be bound to enforce contracts injurious to and against the public good. No man could come into a court and say: "Give me a sum of money which I desire to have contrary to law." There can be no doubt but that compounding a prosecution for wilful and corrupt perjury was a very great offence to the public, and whether it was between some persons who were strangers to this action was not material.

BATHURST, J., said that *Lady Downing* v. *Chapman* (3) was not like the present case.

GOULD, J., said that he differed with the rest of the court in the judgment given in *Lady Downing* v. *Chapman* (3), and that on the whole of that case he thought the averment that the bond there given was on a wicked consideration ought to have been admitted. If this case at Bar had been on a simple contract, the court would not have hesitated a moment, but would have given judgment that it was bad. Should the court sanctify a deed made on a wicked consideration because it was

sealed? To have a deed which ought to be for a man's good turned to evil purposes, he thought very wrong. There was no distinction whether a deed be void at law or by statute.

Upon the second argument of the case in Easter Term,

LORD WILMOT, C.J., delivered the following opinion of the court: Four questions are to be considered: (i) whether it does not appear from the facts alleged in the second plea, that the consideration for giving the bond is an illegal consideration; (ii) whether a bond given for an illegal consideration is not clearly void at common law ab initio; (iii) Supposing the bond is void, whether the facts disclosed in the plea show it void, can, by law be averred and specially pleaded; (iv) if they can be pleaded, then whether this second plea is duly, aptly and properly pleaded.

As to the first question, it has been insisted for the plaintiff that he was not privy to the bargain and agreement, so (as to him) there appears to be nothing illegal done by him. But we are all clearly of opinion that the whole of the transaction is to be considered as one entire agreement, for the bond and note are both dated on the same day, and are for payment of the same sum of money on the same day. The manner of the transaction was to gild over and conceal the truth, and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth, for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury, and, therefore, to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void. What right then has the plaintiff to recover upon this bond which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful.

As to the second point, we are all of opinion that the bond is void ab initio, by the common law, by the civil law, by moral law, and by all laws whatever. It is so held by all writers whatsoever on this subject, except in one passage in GROTIUS, lib. 2, cap. 11, s. 9, where I think he is greatly mistaken and differs from PUFFENDORF, lib. 3, cap. 8, s. 8, who, in my opinion, convicts the doctrine of GROTIUS. In JUSTIN. INSTIT., lib. 3, tit. 20, De turpi causa, s. 23:

> "Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promitat, non valet."

And VINNIUS, in his commentary, carries it so far as to say you shall not stipulate or promise to pay money to a man not to do a crime.

> "Si quis pecuniam promiserit, ne furtium aut cædam faceret, aut sub conditione, si non fecerit, ad huc dicendum, stipulationem nullius esse momenti; cum hoc ipsum flagitiosum est, pecuniam pacisci quo flagitio abstineas."

DIG., lib. 1, tit. 5. CODE lib. 4, tit. 4, to the same point.

This is a contract to tempt a man to transgress the law, to do that which is injurious to the community. It is void by the common law, and the reason why the common law says such contracts are void, is for the public good: You shall not stipulate for iniquity. All writers upon our law agree in this, that no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he has once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again, you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. Procul O! procul esse profani: see DOCTOR AND STUDENT, fo. 12, c. 24.

The third point is whether this matter can be pleaded. It is objected against the defendant that he has no remedy at law, but must go and seek it in a court

of equity. I answer that we are upon a mere point of common law, which must have been a question of law long before the courts of equity exercised that jurisdiction which we now see them exercise—a jurisdiction which never would have swelled to that enormous bulk we now see if the judges of the courts of common law had been anciently as liberal as they have been in later times. To send the defendant in this case into a court of equity is to say there never was any remedy at law against such a wicked contract as this is. We all know when the equity part of the Court of Chancery began. I should have been extremely sorry if this case had been without remedy at common law, est boni judicis ampliare jurisdictionem; and I say, est boni judicis ampliare justitiam. Therefore, whenever such cases as this come before a court of law, it is for the public good that the common law should reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the judges of the common law courts, and that courts of equity have risen by the judges not properly applying the principles of the common law, but being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law.

It is now objected as a maxim that the law will not endure a fact in pais dehors a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed and a record by a record, and that, if there be no consideration for a bond, it is a gift. I answer that the present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shows that in truth the bond never had any legal entity, and if it never had any being at all, then the rule or maxim that a deed must be defeated by a deed of equal strength does not apply to this case. The law will legitimate the showing it void ab initio, and this can only be done by pleading. Nothing is due under such a contract, then the law gives no action. The debitum never existed as much as if it had been said it shall be void because there is no debt, but if this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to me most unreasonable and unrighteous. Therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place. What strange absurdity would it be for the law to say that this contract is wicked and void and in the same breath for the law to say: "You shall not be permitted to plead the facts which clearly show it to be wicked and void." I am not for stirring a single pebble of the common law, and without altering the least tittle thereof I think it is competent and reaches the case before us. For my own part I think all the cases upon Acts of Parliament, with respect to making bonds, etc., void, do warrant the receiving this plea and averment; there is no direction in such Acts of Parliament given for the forms and manner of pleading in those cases; the end directs and sanctifies the means.

I think there is no difference between things made void by Act of Parliament and things void by the common law. Statute law and common law both originally flowed from the same fountain, the legislature. I am not for giving any preference to either, but if to either, I should be for giving it to the common law. If there had ever been any idea or imagination that such a contract as this could have stood good at common law, surely the legislature would have altered it. There has been a distinction mentioned between a bond being void by statute, and at common law, and it is said that in the first case, if it be bad, or void in any part, it is void in toto, but that at common law it may be void in part and good in part, but this proves nothing in the present case. The judges formerly thought an Act of Parliament might be eluded if they did not make the whole void if part was void. It is said: "The statute is like a tyrant; where he comes he makes all void, but the common law is like a nursing father [foster-father], makes only void that part where the fault is, and preserves the rest": *Maleverer* v. *Redshaw* (8) (1 Mod. Rep. at pp. 35, 36). The case of a simoniacal contract may be reached by a plea.

This proves that the contract in the present case is to be avoided at common law. The plea shows a fact which, if true, the bond never had any legal existence at all. As to a bond being a gift, that is to be repelled by showing it was given upon a bad consideration. You may thereby repel the presumption of donation; it has been objected that the admission of such a plea as the present will strike at securities by deed. The answer is that such a plea in the case of infancy, gaming, duress, etc., is admissible. What is the plea of non est factum? Ninety-nine in 100 of them are false; why then is such a plea to be received and not the present plea? I see no reason why. I want no case to warrant my opinion; it is enough for me, if there be no case against me, and I think there is not. In Y.B. 1 Hen. 7, 14, 16 B., Brian, C.J., then expressed an opinion which was founded upon what I have now said. The Chief Justice says:

> "I do not see in any case in the world how a man can avoid a specialty by a bare matter of fact concerning the same deed, if so be that the deed was good at the commencement; but the present deed was never good."

Oldbury v. *Gregory* (11) is a simoniacal contract pleaded to a bond, which was held a bad plea because simony was not then considered as contrary to our law; but at this day, simony being against our law, such a plea would be good.

[His Lordship dealt with the fourth point, and said that the plea was rightly pleaded according to the rules of pleading then in force, but now obsolete.]

Judgment for defendant.

THOMPSON *v.* LEACH

[Court of King's Bench (Holt, C.J., and other judges), Hilary Term, 1697]

[Reported 3 Mod. Rep. 301; Carth. 435; 1 Com. 45; Comb. 468; 1 Eq. Cas. Abr. 278; Holt, K.B. 357; 3 Lev. 285, n.; 1 Ld. Raym. 313; 12 Mod. 173; 2 Salk. 427, 576, 675; 3 Salk. 300; 1 Show. 308, n.; 87 E.R. 199]

Mentally Disordered Person—Contract—Avoidance—Surrender of estate to person entitled in default of issue—Subsequent birth of son to surrenderor.

A tenant for life with remainder to his first and other sons in tail male, with remainder over in default of issue, executed a surrender to the person entitled in default of issue. At the time of the surrender no son had been born to the tenant for life, but three months later a son was born, and after the death of the tenant for life the son took possession. At the time of the surrender the tenant for life was found to have been non compos mentis. On an action to try the question of title between the son of the tenant for life and the person to whom the surrender had been made.

Held: the surrender was void and not merely voidable, save in the sense that it would not have been sufficient to plead non est factum, and, accordingly, the son was entitled to have it set aside.

Notes. Referred to: *Burgoigne* v. *Fox* (1738), 1 Atk. 575; *Yates* v. *Boen* (1738), 2 Stra. 1104; *Zouch d. Abbot and Hallet* v. *Parsons* (1765), post p. 161; *Daily Telegraph Newspaper Co.* v. *McLaughlin*, [1904] A.C. 776.

As to dispositions by mentally disordered persons, see 29 Halsbury's Laws (3rd Edn.) 411; and for cases see 33 Digest (Repl.) 600, 601.

Case referred to:

(1) *Lloyd* v. *Gregory* (1638), Cro. Car. 501; W.Jo. 405; 79 E.R. 1032; 28 Digest (Repl.) 543, *577*.

Also referred to in argument:

Beverley's Case (1603), 4 Co. Rep. 123b; 76 E.R. 1118; 33 Digest (Repl.) 585, *1*.

Darcy v. *Jackson* (1621), Palm. 224; 81 E.R. 1053; 28 Digest (Repl.) 487, *40*.

Chudleigh's Case, *Dillon* v. *Freine* (1594), 1 Co. Rep. 113 b; Poph. 70; 1 And. 309; 76 E.R. 261, Ex. Ch.; 38 Digest (Repl.) 849, *643*.

Trial at Bar in Easter Term, 1697, of an action of trespass and ejectment when a special verdict was found in accordance with the following facts.

Nicholas Leach, being seised in fee simple of certain lands, made his will in these words:

"I devise my manors of Bulkworth, Whitebear, and Vadacot, in Devonshire, and Cresby Goat and Cresby Grange in Northallerton, in Yorkshire, to the heirs males of my body begotten; and for want of such issue male, I devise the same to my brother Simon Leach for life, and after his decease to the first son of the body of the said Simon Leach my brother lawfully to be begotten, and to the heirs males of the body of such first son lawfully to be begotten, with like remainder in tail male to the second, third, fourth, etc., sons; and for default of such issue, to Sir Simon Leach, my kinsman, being son and heir of Simon Leach, of Cadley, in the county of Devon, deceased, and to the heirs males of his body lawfully to be begotten; and for default of such issue, to the right heirs of me the said Nicholas Leach for ever."

Nicholas Leach died without issue. Simon Leach, his brother and heir, with remainder over in contingency as aforesaid, entered, and afterwards married Anne, the daughter of Unton Croke, and after the marriage, viz., Aug. 20, 1674, shortly before a son was born, he executed a deed purporting to surrender the said lands and tenements to Sir Simon Leach in manner following:

"I, Simon Leach, of Elsefield, in the county of Oxon, for divers good causes and valuable considerations me hereunto moving, have granted, surrendered, remised, released, and for ever quit claimed, and confirmed, and by these presents do grant, surrender, remise, release, and for ever quit claim, and confirm, to Sir Simon Leach, of Cadley, in the county of Devon, knight of the Bath, and his heirs and assigns for ever, all and every the manors, etc., to have and to hold the same to the said Sir Simon Leach for ever."

Simon Leach, brother of the testator, was not compos mentis at the time of the sealing and delivery of the surrender. On Nov. 10, 1674, Simon Leach had issue of his body Charles Leach, his son and heir who, after the death of his father, entered, and made a lease to Thompson, by virtue whereof he was possessed until the defendant, Sir Simon Leach, entered upon him.

Two questions were made upon this special verdict. First, whether the surrender by a person non compos mentis was void ab initio, and so could pass no estate to the grantee, for if so, then although the idiot himself was estopped by his own act, yet that could be no bar to him in the remainder, because the act being void, the estate in law still remained in him. Secondly, if it were not void in itself, then whether it was after the death of the party voidable by Charles Leach claiming by virtue of a collateral remainder, and not as heir-at-law to the devisor.

Serjeant Wright and *Serjeant Gould* for the plaintiff.

Northey and *Serjeant Darnall* for the defendant.

PER CURIAM: The grants of infants and of persons non compos are parallel both in law and reason; and there are express authorities that a surrender made by an infant is void: see statutes 7 Anne, c. 19, and 29 Geo. 2, c. 31 [both repealed]. Therefore, this surrender by a person non compos is likewise void: *Lloyd* v. *Gregory* (1). If an infant grant a rent charge out of his estate, it is not voidable,

A but ipso facto void; for if the grantee should distrain for the rent, the infant may have an action of trespass against him.* In all the cases which have been cited, where it is held that the deeds of infants are not void but voidable, the meaning is that non est factum cannot be pleaded, because they have the form, though not the operations of deeds and, therefore, are not void on that account, without showing some special matter to make them of no efficacy.

B Therefore, if an infant make a letter of attorney, though it be void in itself, yet it shall not be avoided by pleading non est factum, but by showing his infancy. Some have endeavoured to distinguish between a deed which gives only authority to do a thing, and such which conveys an interest by the delivery of the deed itself, that the first is void, and the other voidable. But the reason is the same to make them both void; only where a feoffment is made by an infant, it is voidable because C of the solemnity of the conveyance. If Simon Leach had made a feoffment in fee, there had still remained in him such a right which would have supported this remainder in contingency.† This surrender is, therefore, void, and all persons may take advantage of it.

Afterwards a writ of error was brought to reverse this judgment in the House of Lords, but it was affirmed: see SHOW. PARL. CAS. 150.

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ENTICK *v.* CARRINGTON AND OTHERS

[COURT OF COMMON PLEAS (Lord Camden, C.J., Clive, Bathurst and Gould, JJ.), Michaelmas Term, 1765]

F [Reported 2 Wils. 275; 19 State Tr. 1029; 95 E.R. 807]

Constitutional Law—Secretary of State—Powers—Power to grant search warrant.

A Secretary of State does not come within the provisions of the Constables Protection Act, 1750, and neither under that Act or by virtue of his office does he have any jurisdiction to grant a warrant to break open doors and search for illegal articles, e.g., libellous papers. Such a warrant is illegal and void.

G **Notes.** There would appear to be a right in a Secretary of State virtute officii to commit by warrant in a case of high treason: see *R.* v. *Despard*, p. 46, infra. In addition, every Secretary of State, being a Privy Councillor, is on the commission of the peace for each county, and as such can commit for any indictable offence.

Considered: *Howard* v. *Gossett*, *Gossett* v. *Howard* (1847), 6 State Tr.N.S. 319; *Dillon* v. *O'Brien and Davies* (1887), 16 Cox, C.C. 247; *Jones* v. *German*, [1896] H 2 Q.B. 418. Referred to: *Harrison* v. *Bush* (1855), 5 E. & B. 344; *Elias* v. *Pasmore*, [1934] All E.R.Rep. 380; *Leachinsky* v. *Christie*, [1945] 2 All E.R. 395; *Christie* v. *Leachinsky*, [1947] 1 All E.R. 567.

As to the office of Secretary of State, see 7 HALSBURY'S LAWS (3rd Edn.) 377–380. For cases see 11 DIGEST (Repl.) 576, 577. For the Constables Protection Act, 1750, see 18 HALSBURY'S STATUTES (2nd Edn.) 10.

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* In the *Hudson* v. *Jones* Trinity Term, 1707, B.R., it is said to have been held that if an infant grant a rent charge out of his land, it is not absolutely void, but only voidable by him when he comes of age; for that if the grantee should then distrain for the rent, though the other may bring an action of trespass, yet he cannot plead non concessit; for the deed is only voidable by the showing of his infancy, and not void, because it was delivered with his own hand: 4 BAC. ABR. (7th Edn.) 363 and see 5 Co. Rep. 115; 2 Inst. 483; Cro. Eliz. 127; Moore, K.B., pl. 132; Poph. 138.

† Sed quære: see *Jackson* v. *Darcy* (1621) (Palm. at p. 254); *Zouch d. Abbott and Hallet* v. *Parsons* (1765) (1 Wm. Bl. at p. 578 and post p. 166).

Cases referred to:

(1) *R.* v. *Derby* (1712), Fortes. Rep. 140; 92 E.R. 794; 11 Digest (Repl.) 577, *121.*

(2) *R.* v. *Earbury* (1733), 2 Barn.K.B. 346.

(3) *R.* v. *Row and Kendall* (1695), 12 Mod. Rep. 82; Comb. 343; Skin. 596; Holt, K.B. 144; 1 Ld. Raym. 65; 1 Salk. 347; 88 E.R. 1178; sub nom. *Kendal's Case*, 5 Mod. Rep. 78; 11 Digest (Repl.) 576, *119.*

(4) *Seven Bishops' Case* (1688), 3 Mod. Rep. 212; 12 State Tr. 183; 87 E.R. 136; 36 Digest (Repl.) 395, *423.*

(5) *Shergold* v. *Holloway* (1734), Sess. Cas.K.B. 154; 2 Stra. 1002; 93 E.R. 156; 33 Digest (Repl.) 180, *328.*

(6) *Wilkes* v. *Wood* (1763), Lofft. 1; 19 State Tr. 1153; 98 E.R. 489; 11 Digest (Repl.) 577, *122.*

(7) *R.* v. *Cornelius* (1744), 2 Stra. 1210; 93 E.R. 1133; 14 Digest (Repl.) 505, *4888.*

(8) *R.* v. *Purnell* (1748), 1 Wm. Bl. 37; 1 Wils. 239; 96 E.R. 20; 14 Digest (Repl.) 505, *4889.*

Action for Trespass.

The plaintiff, John Entick, declared that the defendants Nathan Carrington and three others, messengers in ordinary to the King, on Nov. 11, 1762, at Westminster, in Middlesex, with force and arms broke and entered his dwelling-house in the parish of St. Dunstan, Stepney, continued there four hours without his consent and against his will, all that time disturbed him in the peaceable possession thereof, broke open the doors to the rooms, and the locks, iron bars, etc., thereto affixed, broke open the boxes, chests, drawers, etc., of the plaintiff in his house, broke the locks thereto affixed, searched and examined all the rooms in his dwelling-house and all the boxes, etc., so broken open; read over, pried into, and examined all the private papers, books, etc., of the plaintiff there found, whereby the secret affairs, etc., of the plaintiff became wrongfully discovered and made public, and took and carried away 100 printed charts, 100 printed pamphlets, etc., of the plaintiff there found, to the damage of the plaintiff, £2,000.

The defendants denied liability, and said that the plaintiff ought not to have his action against them, because on Nov. 6, 1762, before the supposed trespass, and until and all the time of the supposed trespass, the Earl of Halifax was one of the Lords of the King's Privy Council and one of his principal Secretaries of State, and that on that date he made his warrant under his hand and seal directed to the defendants, by which he did in the King's name authorise and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the warrant to be the author, or one concerned in the writing, of several weekly seditious papers, entitled, the "Monitor or British Freeholder," which contained gross and scandalous reflections and invectives upon His Majesty's government, and upon both Houses of Parliament, and him, the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody before the Earl of Halifax to be examined concerning the premisses and further dealt with according to law, in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all other His Majesty's officers, civil and military, and loving subjects, whom it might concern, were to be aiding and assisting to them, the defendants, as there should be occasion. The defendants further said that afterwards and before the alleged trespass the warrant was delivered to them to be executed, and thereupon they, by virtue and for the execution of the said warrant, entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize him and his books and papers in order to bring him and them before the Earl of Halifax, according to the warrant. They found the plaintiff, seized and apprehended him, and searched for his books and papers in his house, necessarily searching and examining the rooms therein, and also his boxes, chests, etc., there, in order to find and seize his books and papers

A and to bring them along with the plaintiff before the earl, according to the warrant. They carried the said books and papers to a house at Westminster, where the earl transacted the business of his office, and delivered the same to one Lovel Stanhope, an assistant to the earl in his office of Secretary of State, to be examined. The plaintiff, on Nov. 17, was discharged out of their custody.

The defendants said that in searching for the books and papers of the plaintiff B they necessarily read over, pried into, and examined the private papers, books, etc., of the plaintiff found in his house, and because the doors in the house leading to the rooms therein, and the boxes, chests, etc., were shut and fastened so that the defendants could not search and examine the rooms, boxes, chests, etc., they necessarily broke and forced open the doors, boxes, chests, etc. They stayed in the plaintiff's house for four hours, and unavoidably during that time disturbed him C in the possession thereof, but they did as little damage to the plaintiff as they possibly could.

The plaintiff replied to this plea of justification, alleging that the defendants unlawfully and without the cause by them alleged, broke and entered his house in manner and form as the plaintiff had complained.

The cause was tried in Westminster Hall before the Lord Chief Justice, when D the jury found a special verdict in which they stated that, if it should seem to the court that the defendants were guilty of the said trespass and that the plaintiff ought to maintain his action against them, the defendants were guilty of the said trespass in manner and form as the plaintiff had complained against them, and they assessed the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in his behalf laid out, to £300, and for those E costs and charges, to 40s.; but if upon the whole matter by the jurors found it should seem to the court that the defendants were not guilty of the trespass, or that the plaintiff ought not to maintain his action against them, then the jurors said that the defendants were not guilty of the trespass in manner and form as the plaintiff had complained against them. The jury found that the defendants broke and entered, and did trespass as the plaintiff in his replication alleged.

F This special verdict was twice argued at the Bar: in Easter Term, 1765, by *Serjeant Leigh* for the plaintiff, and *Serjeant Burland* for the defendants, and in Michaelmas Term, 1765, by *Serjeant Glynn* for the plaintiff, and *Serjeant Nares* for the defendants.

LORD CAMDEN, C.J., delivered the following judgment of the court: The G defendants make two defences: (i) that they are within the Constables Protection Act, 1750, and (ii) that such warrants have frequently been granted by Secretaries of State ever since the revolution and have never been controverted, and that they are legal, upon both which defences the defendants rely.

A Secretary of State, who is a Privy Councillor, if he be a conservator of the peace, whatever power he has to commit is by the common law. If he be con- H sidered only as a Privy Councillor, he is the only one at the board who has exercised this authority of late years; if as a conservator, he never binds to the peace. No other conservator ever did that we can find. He has no power to administer an oath or take bail, but yet it must be admitted that he is in the full exercise of this power to commit for treason and seditious libels against the government, whatever was the original source of that power, as appears from *R.* v. *Derby* (1), I *R.* v. *Earbury* (2), and *R.* v. *Row and Kendall* (3).

We must know what a Secretary of State is, before we can tell whether he is within the Act of 1750. He is the keeper of the King's signet wherewith the King's private letters are signed: 2 Inst. 556; Coke Upon Articuli Super Chartas, 28 Edw. 1. Coke's silence is a strong presumption that no such power as he now exercises was in him at that time. Formerly he was not a Privy Councillor, or considered as a magistrate. He began to be significant about the time of the revolution, and grew great when the princes of Europe sent ambassadors hither. It seems inconsistent that a Secretary of State should have power to commit, and

no power to administer an oath, or take bail. Who can commit and not have power to examine? The House of Commons, indeed, commit without oath, but that is nothing to the present case. There is no account in our law books of Secretaries of State, except in the few cases mentioned. He is not to be found among the old conservators in LAMBERT, CROMPTON, FITZHERBERT, etc., nor is a Privy Councillor to be found among our old books until *R.* v. *Row and Kendall* (3) and 1 LEON. 70, 71. The latter is the first case that takes notice of a commitment by a Secretary of State, but in 2 LEON. 175, the judges knew no such committing magistrate as the Secretary of State. It appears by the Petition of Right that the King and council claimed a power to commit. If the Secretary of State had claimed any such power, then certainly the Petition of Right would have taken notice of it, but from its silence on that head we may fairly conclude he neither claimed nor had any such power. The statute 16 Cha. 1, for regulating the Privy Council and taking away the Court of Star Chamber, binds the King not to commit, and in such case gives a habeas corpus. It is strange that the House of Commons should take no notice of the Secretary of State, if he then had claimed power to commit.

This power of a Secretary of State to commit was derivative from the commitment, per mandatum regis: Ephemeris parliamentaria. COKE says in his speech to the House: "If I do my duty to the King, I must commit without showing the cause"; 1 LEON. 70, 71, shows that a commitment by a single Privy Counsellor was not warranted. By the licensing [of the Press] statute of 13 and 14 Cha. 2, c. 33, s. 15, licence is given to a messenger under a warrant of the Secretary of State to search for books unlicensed, and if they find any against the religion of the Church of England, to bring them before the Secretary of State. The warrant in that case expressed that it was by the King's Command: see STAUNFORD'S comment on the mandate of the King, and LAMBERT, C. Bailment. All the judges in the time of Elizabeth I held that in a warrant or commitment by one Privy Councillor he must show it was by the mandate of the King in council: see AND. 297, the opinion of all the judges. They remonstrated to the King that no subject ought to be committed by a Privy Councillor against the law of the realm. Before the 3 Cha. 1 [Petition of Right Act, 1627] all the Privy Councillors exercised this power to commit; from that time they disused this power, but then they prescribed still to commit per mandatum regis: JOURNAL OF THE HOUSE OF COMMONS 195. In 1640 COKE, SELDEN, etc., argued that the King's power to commit meant that he had such power by his courts of justice. In the *Seven Bishops' Case* (4) all the court and King's council admit that, supposing the warrant had been signed out of the council, it would have been bad, but the court presumed it to be signed at the board. POLLEXFEN in his argument says: "We do not deny but the council board have power to commit, but not out of council." This is a very strong authority. The whole body of the law seems not to know that Privy Councillors out of council had any power to commit. If there had been any such power they could not have been ignorant of it. This power was only in cases of high treason. They never claimed it in any other case. It was argued that if a Secretary of State has power to commit in high treason, he has it in cases of lesser crimes, but this we deny, for if it appears that he has power to commit in one case only, how can we then without authority say he has that power in other cases. He is not a conservator of the peace; ROKEBY, J., only says he is in the nature of a conservator of the peace. We are now bound by *R.* v. *Derby* (1), and *R.* v. *Earbury* (2).

The Secretary of State is no conservator nor a justice of the peace, quasi secretary, within the words or equity of the Constables Protection Act, 1750. Admitting him (for argument's sake) to be a conservator, the preamble of the statute shows why it was made, and for what purpose. The only grantor of a warrant therein mentioned is a justice of the peace. Justice of peace and conservator are not convertible terms. The cases of the construction of old statutes in regard to the Warden of the Fleet, the Bishop of Norwich, etc., are not to be applied to cases upon modern statutes. The best way to construe modern statutes is to follow the words thereof. Let us compare a justice of peace and a conservator. The justice is liable

to actions, as the statute takes notice. It is applicable to him who acts by warrant directed to constables; a conservator is not entrusted with the execution of laws, which by his Act is meant statutes, which give justices jurisdiction. A conservator is not liable to actions. He never acts, he is almost forgotten. There was never an action against a conservator of the peace as such; he is antiquated, and could never have been thought of, when this Act was made. Ad ea quæ frequenter accidunt jura adaptantur. There is no act of a constable or tithingman as conservator taken notice of in the statute. Will the Secretary of State be ranked with the highest or lowest of these conservators? The statute of Ja. 1 for officers acting by authority to plead the general issue, and give the special matter in evidence, when considered with this statute of 1750, the latter seems to be a second part of the act of Ja. 1, and we are all clearly of opinion that neither the Secretary of State nor the messengers are within the Act of 1750. If the messengers had been within it, as they did not take a constable with them according to the warrant, that alone would have been fatal to them, nor did they pursue the warrant in the execution thereof, when they carried the plaintiff and his books, etc., before Lovel Stanhope and not before Lord Halifax. That was wrong, because a Secretary of State cannot delegate his power, but ought to act in this part of his office personally.

The defendants having failed in their defence under the statute of 1750, we shall now consider the special justification, whether it can be supported in law, and this depends upon the jurisdiction of the Secretary of State, for if he has no jurisdiction to grant a warrant to break open doors, locks, and boxes, and to seize a man and all his books, etc., in the first instance upon an information of his being guilty of publishing a libel, the warrant will not justify the defendants. It was resolved by the King's Bench in *Shergold* v. *Holloway* (5), that a justice's warrant expressly to arrest the party will not justify the officer, there being no jurisdiction. The warrant in our case was an execution in the first instance without any previous summons, examination, hearing the plaintiff, or proof that he was the author of the supposed libels, a power claimed by no other magistrate whatever (Scroggs, C.J., always excepted). It was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did, for they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed. There might be nobody to detect them. If this be lawful, both Houses of Parliament are involved in it, for they have both ruled that privilege does not extend to this case. In the case of *Wilkes* [*Wilkes* v. *Wood* (6)], a member of the House of Commons, all his books and papers were seized and taken away. We were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever. If this is law it would be found in our books, but no such law ever existed in this country. Our law holds the property of every man so sacred that no man can set his foot upon his neighbour's close without his leave. If he does, he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was it an issue, at the trial. We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property a man can have. This case was compared with that of stolen goods. Sir Edward Coke denied the lawfulness of granting warrants to search for stolen goods; 4 Inst. 176, 177, though now it prevails to be law, but in that case the justice and the informer must proceed with great caution. There must be an oath that the party has had his goods stolen, and has strong reason to believe they are concealed in such a place, but if the goods are not found there, he is a trespasser, the officer in that case is a witness, there are none in this case, no inventory taken; if it had been legal many guards of property would have attended it.

We shall now consider the usage of these warrants since the revolution. If it

began then it is too modern to be law. The common law did not begin with the revolution. The ancient constitution, which had been almost overthrown and destroyed, was then repaired and revived; the revolution added a new buttress to the ancient venerable edifice. The King's Bench lately said that no objection had ever been taken to general warrants; they have passed sub silentio. This is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house and search for and take away all his books and papers in the first instance, to be law, which is not to be found in our books. It must have been the guilt or poverty of those upon whom such warrants have been executed that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful until this time. We are inclined to think the present warrant took its first rise from the Licensing [of the Press] Act, 1662 (13 & 14 Car. 2, c. 33 [Ruff.]), and are all of opinion that it cannot be justified by law, notwithstanding the resolution of the judges in the time of Charles II and James II that such search warrants are lawful. See the trial of Carr for a libel in State Trials.

There is no authority but of the judges of that time that a house may be searched for a libel, and the twelve judges cannot make law. If a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty in the case of a favourite libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit. It is said it is better for the government and the public to seize the libel before it is published; if the legislature be of that opinion they will make it lawful. Sir Samuel Astley was committed to the Tower for asserting there was a law of State distinct from the common law. The law never forces evidence from the party in whose power it is. When an adversary has got your deeds, there is no lawful way of getting them again but by an action: *R.* v. *Cornelius* (7); *R.* v. *Purnell* (8). Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers.

On the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourselves. We are no advocates for libels. All governments must set their faces against them, and whenever they come before us and a jury we shall set our facs against them. If juries do not prevent them they may prove fatal to liberty, destroy government, and introduce anarchy, but tyranny is better than anarchy, and the worst government better than none at all.

Judgment for plaintiff.

R. *v.* DESPARD

[Court of King's Bench (Lord Kenyon, C.J., Ashhurst, Grose and Lawrence, JJ.), June 25, 1798]

[Reported 7 Term Rep. 736; 101 E.R. 1226]

Constitutional Law—Secretary of State—Powers—Power to commit person charged with offence—Treasonable practices.

Habeas Corpus to bring before the court the defendant who had been committed to prison on a charge "for treasonable practices" by a warrant of the Duke of Portland, one of his Majesty's principal Secretaries of State.

Fergusson moved that the defendant should be discharged for the insufficiency of the warrant of commitment.

The Attorney-General (*Sir John Scott*) opposed the motion.

LORD KENYON, C.J.—The question is whether or not this commitment be good at common law. To one argument used by the defendant's counsel I cannot assent, namely, that no point is to be considered as law unless it has been made and judicially decided. If that were true, farewell to the common law of the land. If I were asked in what case it was determined that a limitation to A. and his heirs gives a fee simple, I should be as unable to answer as Sir Matthew Hale was when the question was put to him. It is sufficient if the point has been acknowledged to be law at all times. The law of the land stands on precedents. I will not say whether or not the number of cases from the Secretary of State's office constitutes

A the law upon this subject, but the course of office and variety of precedents acted upon have been considered by very able judges as evidence of what is the law of the land. I cannot get over the cases now referred to by the Attorney-General [above fifty in all]. The commitments prior to the revolution were complained of as grievances, and probably they gave rise to the Habeas Corpus Act, and if the instances of commitments mentioned on the part of the Crown had happened in the reign of Charles II or James II, I should not have relied much upon them. But the cases now cited happened since the revolution; a time that B FOSTER, J., and other great men considered as an auspicious period for this country, and when the liberties of the subject were well understood and nobly asserted.

Then let me see what was considered to be the law of the land at and after the revolution, and particularly in the time of that great man, HOLT, C.J. Out of the many cases that have now been mentioned, I have selected nine [not enumerated by his Lordship] that cannot be distinguished from the present case, where the commitments were for "treasonable practices" generally, and where HOLT, C.J., and the rest of the court were bound by their oaths to discharge the defendants if the commitments were illegal, and yet the court did not dis- C charge them. Finding these cases, I will not now inquire whether or not HOLT, C.J., decided rightly. I have no sources of intelligence from which I could make the inquiry. The records of the court furnish me with the law of the land. HOLT, C.J., was a man above all praise, and he was assisted by able judges, one of whom was POWELL, J., who fell little short of HOLT, C.J., himself. I will not overturn the law of the land as it has been handed down to me. It is not for the judges, who are to watch over the law, to overset it. Therefore, on the authority of the precedents, nine of which are precisely in point, I am clearly of opinion D that, if we were to yield to this application, we should forget the duty we owe to the public.

ASHHURST, J.—The concurrence of men of such talents as LORD NOTTINGHAM, LORD SOMERS, HOLT, C.J., and LORD COWPER, when acting on warrants of this kind, is nearly equal in authority to an express decision on the very point. It is rather an extraordinary position of the defendant's counsel in this case that nothing is to be considered as law but what has been solemnly decided, for a point may be so clear that it was never doubted, and yet if this position were well founded, it would not be law.

E **GROSE, J.**—The question is whether the prisoner has a right to be bailed or discharged. The ground on which it is contended that he ought to be bailed or discharged is that the warrant does not specify what are the treasonable practices of which he is accused. It is admitted that a person may be committed for treason or suspicion of treason without specifying the particular kinds of treason, and it now appears that there are precedents of warrants of commitment for treasonable practices, precisely in the form of this warrant, from the year 1694 to the present time. Then came the late Act of Parliament [Habeas Corpus F Suspension Act, 1798] which says that persons detained under warrants of commitment for treasonable practices in the very words of this warrant shall not be bailed. Yet we are desired to discharge this prisoner against the positive directions of the Act.

LAWRENCE, J.—With regard to the precedents cited of warrants like this, I think they are decisive of the present case. They are not to be compared to warrants signed by magistrates, who are not of the profession of the law, for some of them were signed by persons of the greatest eminence in the law, and, therefore, they are entitled to have great weight. G Besides which it appears that several of the persons committed by those warrants have been at different times since the revolution brought up here, and that this court thought they ought to be remanded unless they could give security. I express myself better on this occasion than PARKER, C.J., did in *Sir William Wyndham's Case* [i.e., *R.* v. *Wyndham* (1716), 1 Stra. 2: 14 DIGEST (Repl.) 184, *1507*], where he said:

> "It has been urged that some particular species of treason must be expressed, and that it must have so much certainty as to appear to be high treason to the court. I H think this opinion is not to be maintained. We presume a magistrate does right, until the contrary appears; and it has never been holden necessary to express the covert act in the commitment."

So in cases of this sort it is not necessary to express in the warrant the particular species of treasonable practices.

A

GATEWARD'S CASE

[Court of Common Pleas (Sir Edward Coke, C.J., Walmsley, Warburton and Daniel, JJ.), Hilary Term, 1607]

[Reported 6 Co. Rep. 59b; Cro. Jac. 152; 77 E.R. 344]

B

Custom—Profit à prendre—Easement—Right of inhabitant to have profit à prendre and easement in another's land.

There cannot be a custom for inhabitants, as such, to have profit à prendre in the soil of another, but there may be a custom for every inhabitant to have a discharge for tithes in his own land or an easement in the land of another.

Notes. Considered: *Day* v. *Savadge* (1614), Hob. 85; *North* v. *Coe* (1668), C Vaugh. 251; *Osbuston* v. *James* (1688), 2 Lut. 1377; *R.* v. *Ecclesfield* (1818), 1 B. & Ald. 348; *Lockwood* v. *Wood*, [1843–60] All E.R.Rep. 415; *Rogers* v. *Brenton* (1847), 10 Q.B. 26. Applied: *A.-G.* v. *Mathias* (1858), 4 K. & J. 579. Considered: *Constable* v. *Nicholson* (1863), 14 C.B.N.S. 230; *Austin* v. *Amhurst* (1877), 7 Ch.D. 689. Followed: *Rivers* v. *Adams* (1878), 3 Ex.D. 361. Approved: *Goodman* v. *Saltash Corpn.*, [1881–5] All E.R.Rep. 1076. Considered: *Re Christchurch* D *Inclosure Act* (1887), 35 Ch.D. 355. Followed: *Tilbury* v. *Silva* (1890), 45 Ch.D. 98. Considered: *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344. Referred to: *Ordeway* v. *Orme* (1612), 1 Bulst. 183; *Baker* v. *Brereman* (1635), Cro. Car. 418; *Bond's Case* (1639), March, 16; *Miller* v. *Spateman* (1669), 2 Keb. 570; *Payne* v. *Partridge* (1690), 1 Show. 255; *Weekly* v. *Wildman* (1698), 1 Ld. Raym. 405; *Drake* v. *Wiglesworth* (1752), Willes, 654; *English* v. *Burnell* (1765), 2 Wils. 258; E *Grimstead* v. *Marlowe* (1792), 4 Term Rep. 717; *Jones* v. *Robin* (1847), 10 Q.B. 620; *Rogers* v. *Brenton* (1847), 10 Q.B. 26; *Lloyd* v. *Jones* (1848), 6 C.B. 81; *Mounsey* v. *Ismay* (1863), 11 W.R. 270; *Murphy* v. *Ryan* (1868), 16 W.R. 678; *London City Sewers Co.* v. *Glasse* (1872), 7 Ch. App. 456; *R.* v. *Rollett* (1875), L.R. 10 Q.B. 469; *Chilton* v. *London Corpn.* (1878), 7 Ch.D. 735; *Chesterfield* v. *Harris* [1908] 2 Ch. 397; *Mitcham Common Conservators* v. *Banks* (1912), 76 J.P. F 413; *Wolstanton, Ltd.* v. *Newcastle-upon-Tyne Borough Council*, [1940] 3 All E.R. 101.

As to custom, see 11 Halsbury's Laws (3rd Edn.) 168 et seq.; and for cases see 17 Digest (Repl.) 3 et seq.

Case referred to:

(1) *Foiston* v. *Crachroode* (1587), 4 Co. Rep. 31 b; 76 E.R. 962; 11 Digest G (Repl.) 29, *371*.

(2) *Withers* v. *Iseham* (1552), 1 Dyer, 70 a.

Action of trespass brought by Robert Smith against Stephen Gateward for breaking and entering the plaintiff's close at Horsington in the county of Lincoln, called Horsington Holmes, on Aug. 1, 1601 (with continuance), and depasturing with some beasts, i.e., horses, cows and sheep. H

The defendant pleaded that Stixwold was an ancient vill adjoining Horsington Holmes and that it was and had been from time immemorial the custom for every inhabitant within any messuage in Stixwold by reason of his residence therein to have common of pasture for all his beasts in Horsington Holmes at all times of the year; and he justified his trespass as an inhabitant of Stixwold.

I

SIR EDWARD COKE, C.J., in his report, stated that on this plea of the defendant the plaintiff demurred in law. In this case, he continued, it was unanimously resolved by all the justices of the Common Pleas that the custom was against law for several reasons. There are but four manner of commons, i.e., common appendant, appurtenant, in gross and by reason of vicinage, and this common ratione commorantiæ et resident is none of them and argumentum a divisione est fortissimum in jure. What estate shall he have who is inhabitant in the common, when it appears he has no estate or interest in the house (but a

A mere habitation and dwelling) in respect of which he ought to have his common? For none can have interest in common in respect of a house in which he has no interest. Such common will be transitory and altogether uncertain, for it will follow the person, and for no certain time or estate but during his inhabitancy, and such manner of interest the law will not suffer for custom ought to extend to that which has certainty and continuance. It will be against the nature and quality B of a common for every common may be suspended or extinguished, but such a common will be so incident to the person that no person certain can extinguish it, but as soon as he who releases, removes, the new inhabitant shall have it. If the law should allow such common, the law would give an action or remedy for it; but he who claims it as inhabitant can have no action for it. In these words "inhabitants and residents" are included tenant in fee simple, tenant for life, for C year, tenant by elegit, etc., tenant at will, etc., and he who has no interest but only his habitation and dwelling; and by the rule of all our books without question etc., the tenant in fee simple ought to prescribe in his own name, the tenant for life, years, by elegit, etc., and at will, etc., in the name of him who has the fee; and as he who has no interest can have no common, so there is none who has any interest, albeit but at will, and by good pleading he may enjoy it. No improve- D ment can be made in any wastes if such common (custom) should be allowed, for the tenants for life, for years, at will, tenant by elegit, statute-staple, and statute-merchant of houses of the lord himself would have common in the wastes of the lord himself if such prescription should be allowed, which would be inconvenient.

But two differences were taken and agreed by the whole court: (i) between a charge in the soil of another and a discharge in his own soil; (ii) between an E interest or profit to be taken or had in another's soil and an easement in another's soil. Therefore, a custom that every inhabitant of a town has paid a modus decimandi to the parson in discharge of their tithes is good, for they claim not a charge or profit à prendre in the soil of another, but a discharge in their own land; so of a custom that every inhabitant of such a town shall have a way over such land, either to the church or market, etc., that is good, for it is but an easement F and no profit, and a way or passage may well follow the person and no such inconvenience as in the case at Bar.

It was further resolved that copyholders in fee, or for life, may by custom of the manor have common in the demesnes of the lord of the manor, but then they ought to allege the custom of the manor to be quod quilibet tenens customarius cujuslibet antiqui mesuagii customarii, etc., and not quod quilibet inhabitans infra G aliquod antiquum messuagium customarium, etc. For a copyholder has a customary interest in the house, etc., and, therefore, he may have a customary common in the lord's wastes; and in such case he cannot prescribe in the name of the lord, for the lord cannot claim common in his own soil and, therefore, of necessity such custom ought to be alleged: see Y.B. 21 Edw. 3, 34; *Foiston* v. *Crachroode* (1). Another difference was taken, and agreed, between a prescription which always H is alleged in the person, and a custom which always ought to be alleged in the land, for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, ex certa causa rationabili (as Littleton said) usitata, but need not be intended to have a lawful beginning as custom to have land devisable, or of the nature of gavelkind, or borough-English, etc. These and the like customs are reasonable, but by common I intendment they cannot have a lawful beginning, by no grant, or act or agreement, but only by Parliament. See also for this matter *Foiston* v. *Crachroode* (1). Also it was agreed that the custom of a manor that dominus pro tempore shall grant lands customary is good, and tenant at will may do it; and so Y.B. 20 Hen. 6, 8 b., by the custom of the Court of Common Pleas, the Chief Justice grants divers offices for life, and these customs are good. But in such cases he who grants them has an interest in the manor or office, and their grant is made good by the custom. And 19 Rich. 2, Action sur le case 52. A beadle of the hundred shall have three flagons of beer of every brewer who sells within the hundred, causa qua supra. But a

custom that an inhabitant or resident shall grant or take any profit is merely void. If the custom had been alleged that quilibet pater-familias infra aliquod antiquum messuagium, etc., it would also be insufficient for the causes and reasons aforesaid; and if he has any interest, he may be relieved as aforesaid: vide YEAR BOOKS 7 Edw. 4, 26, A.; 15 Edw. 4, 29, B. and 32; 18 Edw. 4, 3 B.; 20 Edw. 4, 10 B.; 18 Hen. 8, 1 B.; 19 Hen. 8 reported by SPELMAN, that such custom is not warranted by law, and so was it adjudged in this court in Trinity Term, 33 Eliz. Rot. 422 (*Lawrence* v. *Hull*). See the BOOK OF ENTRIES, Trespass, Common 6; Y.B. 9 Hen. 6, 62 B.; *Withers* v. *Iseham* (2).

PIGOT'S CASE

[COURT OF KING'S BENCH (Sir Edward Coke, C.J., Doderidge and Haughton, JJ.), Trinity Term, 1614]

[Reported 11 Co. Rep. 26 b; 2 Bulst. 246; 1 Roll. Rep. 39; Moore, K.B. 835; 77 E.R. 1177]

Deed—Avoidance—Alteration in material point without privity of obligee—Alteration by stranger in immaterial point.

When any deed is altered in a material point by the obligor or by any stranger without the privity of the obligee, be it by interlineation, addition, erasure, or the drawing of a pen through a line or any material word, the deed becomes void. But if a stranger, without the privity of the obligee, alters the deed by any of the above ways in any point not material, it shall not avoid the deed.

PER CURIAM: If some of the covenants of an indenture or of the conditions endorsed on a bond are against law and some good and lawful, the covenants or conditions which are against law are void ab initio and the others stand good.

Notes. Applied: *Master* v. *Miller* (1791), 4 Term Rep. 320; *Earl of Falmouth* v. *Roberts* (1841), 11 L.J.Ex. 180. Considered: *Davidson* v. *Cooper* (1844), 13 M. & S. 343. Applied: *Mollett* v. *Wackerbarth* (1847), 5 C.B. 181. Considered: *Burchfield* v. *Moore* (1854), 3 E. & B. 683. Applied: *Croockewit* v. *Fletcher* (1857), 1 H. & N. 893. Distinguished: *Adsetts* v. *Hives* (1863), 33 Beav. 52. Not followed: *Aldous* v. *Cornwell* (1868), L.R. 3 Q.B. 573. Considered: *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555; *Bishop of Crediton* v. *Bishop of Exeter*, [1904–7] All E.R.Rep. 552; *Bagot* v. *Chapman*, [1907] 2 Ch. 222; *Koch* v. *Dicks*, [1932] All E.R.Rep. 476. Referred to: *Miller* v. *Manwaring* (1635), Cro. Car. 397; *Hervey* v. *Aston* (1738), West temp. Hard. 350; *Colton* v. *Goodridge* (1776), 2 Wm. Bl. 1108; *Henfree* v. *Bromley*, [1803–13] All E.R.Rep. 383; *Sanderson* v. *Symons* (1819), 4 Moore, C.P. 42; *Collins* v. *Gwynne* (1831), 5 Moo. & P. 276; *Hibblewhite* v. *McMorine* (1840), 6 M. & W. 200; *Mason* v. *Bradley* (1843), 11 M. & W. 590; *Bank of Australia* v. *Breillat* (1847), 6 Moo.P.C.C. 152; *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851), 16 Q.B. 432; *Gardner* v. *Walsh* (1855), 5 E. & B. 83; *Simons* v. *Great Western Rail. Co.* (1857), 2 C.B.N.S. 620; *Caldwell* v. *Parker* (1869), 17 W.R. 955; *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802; *Howatson* v. *Webb*, [1908] 1 Ch. 1; *Wild* v. *Simpson*, [1918–19] All E.R.Rep. 682; *Chichester Diocesan Fund and Board of Finance (Inc.)* v. *Simpson*, [1944] 2 All E.R. 60.

As to avoidance of deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 360 et seq.; and for cases see 17 DIGEST (Repl.) 241 et seq. As to alteration of a written contract, see 8 HALSBURY'S LAWS (3rd Edn.) 176–178; and for cases see 12 DIGEST (Repl.) 405 et seq.

Cases referred to:

(1) *Anon.* (1566), 3 Dyer, 261 b; 73 E.R. 580; 17 Digest (Repl.) 358, *1643*.

(2) *Shulter's Case* (1611), 12 Co. Rep. 90; 77 E.R. 1366; 17 Digest (Repl.) 242, *456*.

(3) *Matthewson* v. *Lydiate* (1597), Cro. Eliz. 546; 78 E.R. 792; sub nom. *Matthewson's Case*, 5 Co. Rep. 22 b.; 17 Digest (Repl.) 246, *494*.

Action of debt by the plaintiff on a bond made to the plaintiff by the defendant in £60.

The plaintiff, Benedict Winchcombe, was sheriff of the county of Oxford. The condition of the bond was that George Watkins should appear in the King's Bench mense paschæ to answer to George Cottle in a plea of trespass, and that the bond was delivered by the defendant, Henry Pigot, as his deed to the use of the plaintiff. After the delivery of the deed the following words, i.e., "Sheriff of the county of Oxford," were inserted and interlineated in the said writing after the words "Benedict Winchcombe, Esq.," and before the said words "in £60" previously mentioned in the said deed, without the privity of the said Benedict. The question which the jury referred to the court was whether on the above facts it should seem to the justices and court that what was written was the deed of the said Henry Pigot or not. The defendant, without demanding oyer of the bond or condition, pleaded non est factum, and the jury gave a special verdict to the effect that the bond was made to the plaintiff in the same manner as he had declared.

SIR EDWARD COKE, C.J., in his report stated that the court resolved the following points: (i) When a lawful deed is erased whereby it becomes void, the obligor may plead non est factum and give the matter in evidence, because at the time of the plea pleaded it is not his deed.

(ii) When any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, erasing or by drawing of a pen through a line or through the middle of any material word, the deed thereby becomes void; as if a bond is to be made to the sheriff for appearance, etc., and in the bond the sheriff's name is omitted, and after the delivery thereof his name is interlined, either by the obligee or a stranger without his privity, the deed is void. So if one makes a bond of £10 and after the sealing of it another £10 is added, which makes it £20, the deed is void; so if a bond is erased by which the first word cannot be seen, or if it is drawn with a pen and ink through the word although the first word is legible, yet the deed is void and shall never make an issue, whether it was in any of these cases altered by the obligee himself or by a stranger without his privity. So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void.* But if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed: 3 Dyer, 261, pl. 28 [*Anon.* (1)]. Therefore, in the present case, the addition made by a stranger without the privity of the plaintiff being in a point not material for anything that appears to the court, for this cause judgment was given for the plaintiff.

In this case it was moved at the Bar when a deed shall be good in part and void in part. As to that, I conceive that there is a difference when a deed is void ab initio and when it becomes void by misfeasance ex post facto. Also there is a difference when the deed which is void in part ab initio consists on the entirety and when on divers several clauses; and in these also there is a difference, when the several clauses are absolute and distinct and when they are several, and yet the one has dependency on the other. As to the first, it is unanimously agreed in Y.B. 14 Hen. 8, fo. 25, pl. 7, that, if some of the covenants of an indenture or of the conditions endorsed on a bond are against law and some good and lawful, the covenants or conditions which are against law are void ab initio and the others stand good.

* But see now *Bishop of Crediton* v. *Bishop of Exeter*, [1904–7] All E.R.Rep. 552; [1905] 2 Ch. 455.

So if three distinct bonds are written on one piece of parchment and one of them only is read to the obligor and he, being a man not lettered, seals and delivers this deed, it is good for that which was read and ab initio void for the others; and this case is agreed by BRUDNEL [BRUDENELL] and POLLARD, JJ., in Y.B. 14 Hen. 8, 26 A. In Y.B. 9 Hen. 5, fo. 15 A., one brought a writ of debt of £20 against another and declared on a bond of the same sum. The defendant pleaded that he was a layman and could not read and that he acknowledged to be bound to the plaintiff by the same deed in 20s., which he had paid and showed an acquittance thereof; and as to the remnant of the sum in the bond, it was not his deed. It was held a good plea. Which case being of one entire sum proves without question that, if there are two absolute and distinct clauses in a deed and the one is read to the party not lettered and the other not, the deed is good for the clause which was read and ab initio void for the residue; and, although the deed consisting on an entire sum was void for the whole, as it is agreed in Y.B. 14 Hen. 8, fo. 26 A. and 30 Edw. 3, 31 B., yet it was wisely done by the defendant's counsel in Y.B. 9 Hen. 5, 15 A., to plead the truth of his client's case and not to leave the matter on any question in law when the truth of the matter would take away all questions.

In Y.B. 30 Edw. 3, 31 B., casu ultimo, in assize before STOUFFE and others in the country, the defendant pleaded a feoffment from the plaintiff to him by deed of the land in bar to have and to hold to him and his heirs, comprehending a letter of attorney to deliver seisin, etc. The plaintiff being a layman not lettered, the deed with the warrant of attorney was read to him according to the form of an estate tail, and on the same intent he sealed and delivered the deed, with the letter of attorney in it, to deliver seisin. In that case, although the clause of the feoffment in fee and the warrant of attorney are two several clauses, yet forasmuch as the warrant of attorney depended on the feoffment and had relation to an estate in fee, although that was well and truly read, the whole was adjudged to be void. THORPE, J., said that every deed ought to have writing, sealing and delivery, and when anything shall pass from them who had not understanding but by hearing only, it ought to be read also. It is true that he who is not lettered is reputed in law as he who cannot see, but hear only, and all his understanding is by his hearing. And so a man who is lettered and cannot see is, as to this purpose, taken in law as a man not lettered; and, therefore, if a man is lettered and is blind, if the deed is read to him in another manner he shall avoid the deed, because all his understanding in such case is by his hearing, as it was resolved in the case of *John Shulter* (*Shulter's Case* (2)), of the county of Wilts, in the Star Chamber in 1611, who was a man of 115 years at the time of his death.

In Y.B. 47 Edw. 3, fo. 3, pl. 5, John Pinschon brought an action of debt against Thomas Gerves and others, executors of John Northgate, on a bond made by the testator of £100. The defendants pleaded a release from the plaintiff of all manner of actions; and also the plaintiff, by that deed, had received £20 of the testator, and the deed was read, which expressed that he had received £20 in solutione de £100 et etiam remis. omnimodas actiones, etc. To which the plaintiff said that the testator was indebted to him in £20 for other contracts. It was agreed between them that the plaintiff should release that £20; and because the plaintiff was a layman and knew not what was written in the deed and what not, by agreement between them the deed was delivered to Thomas Gerves, now one of the executors, to keep on such condition that, if the deed mentioned only the £20 in which he was bound to him by reason of the contracts, then the deed should be delivered to John Northgate; and if not, that it should be delivered to the plaintiff. FINCHDEN, C.J., said, if what you say is true you may safely deny the deed, for as to parcel which was made according to the agreement, the deed is good, and as to the other parcel, that a thing is written of which you know nothing; so that as to parcel you may acknowledge a deed of parcel, and as to parcel which was not read to him deny the deed. The same is in a manner affirmed by PERSAY, but he said that it would be absurd to lay people to plead

non est factum as to parcel. But afterwards it seemed that the bailment to Thomas Gerves was not any delivery of the deed unless the conditions were performed; wherefore the defendants showed that the conditions were performed, and that the deed by the plaintiff's assent was delivered to the testator, on which issue was taken, viz., that the deed was not delivered to him in his lifetime with the plaintiff's assent, which case is cited in Y.B. 14 Hen. 8, 26 A., to be adjudged, but is there ill-reported by the reporter. But if a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation or erasure, this misfeasance ex post facto avoids the whole deed, as it is held in Y.B. 14 Hen. 8, fo. 25, pl. 7. For although they are several covenants, yet it is but one deed: Y.B. 3 Hen. 7, fo. 5 A. If two are bound in a bond and afterwards the seal of one of them is broken off, this misfeasance ex post facto avoids the whole deed against both: *Matthewson's Case* (3).

PHILIPS *v.* BURY

[Court of King's Bench (Holt, C.J., Dolben, Gregory and Eyre, JJ.), Trinity Term, 1694]

[Reported 2 Term. Rep. 346; Comb. 265; Holt, K.B. 715; 1 Ld. Raym. 5; 4 Mod. Rep. 106; Show. Parl. Cas. 35; 1 Show. 360; Skin. 447; 100 E.R. 186]

Charity—Visitor—Eleemosynary corporation—Visitatorial power—Limitation—Review by common law courts.

A visitatorial power is, of necessity, created by law and attaches to all eleemosynary corporations. This power enables the visitor to prevent all perverting of the charity and to compose the differences that may arise among those who enjoy the benefit of the charity. The jurisdiction of the visitor is limited by the rules and statutes of the corporation, and, if the founder has not so directed, no appeal lies from the decision of the visitor to the common law courts and is not examinable there.

Notes. Considered: *R.* v. *Chester* (1747), 1 Wm. Bl. 22; *Green* v. *Rutherford* (1758), post p. 153; *R.* v. *Ely* (1757), 1 Wm. Bl. 71; *St. John's College, Cambridge* v. *Todington* (1757), 1 Burr. 158. Explained: *R.* v. *Ely* (1794), 5 Term Rep. 475. Considered: *A.-G.* v. *York* (1831), 2 Russ. & M. 461; *Re York* (1841), 2 Q.B. 1. Referred to: *Birmingham School Case* (1726), Gilb. Ch. 178; *Snape* v. *Lincoln* (1728), 1 Barn.K.B. 122; *Bentley* v. *Ely* (1729), Fitz.-G. 107, 305; *Walker's Case* (1736), Lee temp. Hard. 212; *Young* v. *Lynch* (1753), Say, 84; *Whiston* v. *Rochester* (1849), 7 Hare, 532; *R.* v. *Chester* (1850), 15 Q.B. 513; *Ex parte Buller* (1855), 25 L.T.O.S. 102; *McGeath* v. *Geraghty* (1866), 15 W.R. 125; *Phillpotts* v. *Boyd* (1875), L.R. 6 P.C. 435; *Comb* v. *De La Bere* (1881), 6 P.D. 157; *R.* v. *Dunsheath, Ex parte Meredith*, [1950] 2 All E.R. 741.

As to visitor's jurisdiction over charities, see 4 Halsbury's Laws (3rd Edn.) 408 et seq.; and for cases see 8 Digest (Repl.) 504 et seq.

Cases referred to:

(1) *R.* v. *Apleford* (1672), 2 Keb. 861; 84 E.R. 545; sub nom. *Appleford's Case*, 1 Mod. Rep. 82; sub nom. *R.* v. *New College*, Oxford, 2 Lev. 14; 8 Digest (Repl.) 505, *2269*.

(2) *Farchild* v. *Gayre* (1605), Cro. Jac. 63; sub nom. *Fairchild* v. *Gaire*, Yelv. 60; 19 Digest (Repl.) 393, *1948*.

(3) *Sutton's Hospital Case* (1612), ante p. 11; 10 Co. Rep. 23a; Jenk. 270; 77 E.R. 960, Ex. Ch.; 8 Digest (Repl.) 502, *2223*.
(4) *Kenn's Case* (1606), 7 Co. Rep. 42 b; Jenk. 289; 77 E.R. 474; sub nom. *Robertson* v. *Lady Stallage*, Cro. Jac. 186; 21 Digest (Repl.) 315, *730*.
(5) *Caudrey's Case* (1591), 5 Co. Rep. 1 a; 77 E.R. 1; sub nom. *Cawdry* v. *Atton*, Poph. 59; 19 Digest (Repl.) 242, *16*.
(6) *Allen* v. *Nash* (1637) W.Jo. 393; 2 Roll. Abr. 219; 82 E.R. 206; 19 Digest (Repl.) 371, *1655*.
(7) *Bird* v. *Smith* (1606), Moore, K.B. 781; 72 E.R. 902; 19 Digest (Repl.) 244, *30*.
(8) *Coveney's Case* (1561), 2 Dyer, 209a; 73 E.R. 461; 8 Digest (Repl.) 505, *2266*.
(9) *Bagg's Case* (1615), 11 Co. Rep. 93 b; 1 Roll. Rep. 224; 77 E.R. 1271; 13 Digest (Repl.) 217, *382*.

Action of Electment brought against the defendant, Dr. Bury, rector of Exeter College, Oxford, by Robert Philips who declared under the demise of William Painter, who was at the time of making the lease rector of the college, of a messuage called the Rectory House. The defendant pleaded that the house in question was the freehold of the rector and scholars of the college and that he was then rector of the college and in right of the rector and scholars he entered the messuage in question and ejected the plaintiff.

DOLBEN, GREGORY and **EYRE, JJ.**, delivered judgments in the defendant's favour.

HOLT, C.J., delivered the following dissenting judgment, which is taken from his own manuscript: I will put the case as shortly as I can on the record, and it is thus. Exeter College, Oxford, was founded by William Stapleton to consist of a rector and scholars. By the statutes and constitution of the college, the bishop of Exeter, for the time being, is appointed visitor, to visit by himself or commissary, and the time is set when he shall visit at the request of the college as often as they think requisite and, without such request, once in five years ex officio. It is then directed that in his visitation he may proceed to the deprivation of the rector or to the expulsion of the scholars. Then there is a qualification of this power by the particular words of the statute: "Si tamen ad deprivationem rectoris aut expulsionem scholaris alicujus per episcopum aut ejus commissarium agatur," then his crimes shall be shown to him, and if he cannot probably make out his innocence, that he shall be removed without further appeal. Dum tamen ad ejus expulsionem, there shall be the consent of the rector and three of the seven senior fellows. The statute goes on, that if the rector is removed by the bishop's commissary, etiam consentientibus four of the senior fellows, he may appeal to the bishop.

Then there is another statute which shows for what faults and crimes the rector shall be deprived: wasting or alienating the revenues or goods of the college, adultery and some particular things. Then it shows the method that shall be taken against him when they do proceed to deprivation, i.e., within fifteen days after the fact committed he shall by the college be admonished to resign. Then they are to apply to the bishop and, if he is convicted, the bishop or his vicar may proceed to deprive him.

There was one scholar, Colmer, expelled from the college by the rector and fellows for incontinency. He appealed against this expulsion to the bishop, as visitor, in March, 1690. On the appeal the bishop granted a particular commission to Doctor Masters to examine this matter. He went to the college and his proceedings are found in the verdict. He reversed the sentence of expulsion and restored Colmer to his fellowship. After this the bishop appointed a visitation to be held in the chapel [on June 16] when the doors were shut. The rector and scholars would not open the doors, but protested in the area against the visitation. The visitor called over the names of the rector and scholars, swore one to prove the summons and went away without doing anything more.

After this another visitation was appointed to be held in the hall on July 24. At that time the bishop repaired thither and divers protestations against the visitation were made. However, the bishop proceeded, called over the names, registered the act of June 16 and, on several warnings to appear, Doctor Bury [the rector of the college and defendant in this case] and divers of the fellows having absented themselves and refused to submit to the visitation, were pronounced contumacious. The bishop first expelled Doctor Horne and suspended some of the senior fellows. Afterwards, with the consent of the unsuspended fellows, he deprived the rector. That sentence of deprivation being thus given, the college proceeded to a new election and elected Mr. Painter who joined in the lease to the plaintiff on which this action is brought.

The question is whether this sentence of deprivation, given by the bishop against Doctor Bury, makes the rectorship of Exeter College void as to him, and so consequently gives a title to the lessor of the plaintiff. My brothers have all given their opinions that this sentence of deprivation is a void sentence, that Doctor Bury continues rector; that the rectory is not void by that sentence and that judgment ought to be given for the defendant. I must crave leave to differ from them in this case, for I am of opinion, on this verdict, that judgment ought to be given for the plaintiff, and that this deprivation by the visitor is a good deprivation to void the rectory.

The questions that I ask in this case are but two: (i) whether or not by the constitution of this college the Bishop of Exeter had power in this case to give sentence; (ii) supposing he had such a power, whether the justice of this sentence be examinable in this court on this action. I am of opinion that the bishop had power by the constitution of the college to give a sentence, and having that power, the justice of that sentence is not to be examined in a court of law on an action.

Concerning the bishop's power, there have been several things said which I would take notice of. The first thing is, what time he has by the constitution of the college, to make his visitation in. I agree that he can make his visitation but once in five years, unless he is called by the request of the college; and if he comes uncalled within the five years, his visitation would be void, and if he gave, then, any sentence, that would be a mere nullity as coram non judice. But I hold that the visitation of July 24 was a good visitation and consequently, the sentence given on it is good.

Two objections have been made against it. First, it is objected that Doctor Master's coming in March to examine Colmer's appeal on the visitor's commission was a visitation. I think there is no colour that it should be accounted a visitation, because it is only a commission on a particular complaint made by a single expelled fellow for an injury supposed to be done to him. Colmer complained that he was expelled without just cause and appealed to the visitor for redress. They had expelled him for incontinency, whereas he thought himself innocent, and the visitor sent his commissary to examine this particular matter only. Now although the visitor is restrained by the constitutions of the college from visiting ex officio more than once in five years, yet as visitor, he has a standing, constant authority at all times to hear the complaints and redress the grievances of the particular members. That is the proper office of a visitor, which appears by LITTLETON, s. 136.

So it was held in this court in *Appleford's Case* (1), who was expelled on a like accusation as Colmer was. He appealed to the visitor, the Bishop of Winton, who confirmed the expulsion. For visiting is one act in which he is limited to time; but hearing appeals and redressing grievances is his proper office and work at all times. It is like the case of all the bishops of England who can visit but once in three years; but their courts are always open to hear complaints and determine causes. So that although the bishop here can visit but once in five years, unless called, yet he has power and authority to hear any difference between the members and redress any particular injury at any time.

The next thing to be considered is whether that which was done on June 16

was a visitation. There is no question but that the bishop did intend to visit then, and went thither to proceed in the visitation; but they would not let him enter the chapel where he had appointed it to be held. It would be absurd to construe his coming there to visit to be a visitation, which imports a judicial proceeding. It appears he did no act but called over the names to see who it was that hindered him from visiting. But it is said that after this he administered an oath at the time, and when he came in July he made an act of it. Therefore, says EYRE, J., this is tacking the visitation in June to that of July, and the visitation continued much longer than was intended; nay, than it can continue by the constitution and statutes of the college, for it is thereby to cease in three days. I make quite another construction of it. When he was hindered in June and made an act of this at his visitation in July, that was only in order to call them to account for their contumacy and to bring them in judgment at his visitation; it is no more than taking an affidavit of the service of his citation. If that which was done in June should amount to a visitation, it would be in the power of the rector and fellows, by their contumacy, at any time to hinder the effect of a visitation, and such their contumacy would never be punished.

The next thing to be considered is what arises from the construction of the statute de visitatione, whether there is a necessity that there should be the consent of the four senior fellows to the deprivation of the rector. For if there was such a necessity by the statutes of the founder, I agree this sentence was a nullity. However, as this statute is framed, I conceive it is not necessary, but the bishop has a power to deprive the rector (although the four seniors do not concur in the sentence) for the following reasons. First, by the statutes the Bishop of Exeter for the time being is made the ordinary visitor of Exeter College, and it is clear that, where anyone is visitor of a college, he has full and ample power to deprive and remove any member of the college, qua visitor. Secondly, there is an express power given to the bishop to proceed to the deprivation of the rector or the expulsion of a scholar, in his visitation. But thirdly, although there are qualifications of the bishop's power in the expulsion of a scholar, yet the bishop's power in depriving the rector is not limited to be with the consent of four of the seven senior fellows.

The words of the statute are:

> "Si tamen ad deprivationem aut inhabilitatem rectoris aut expulsionem scholaris alicujus per episcomum Exon vel ejus commissarium agatur, dummodo ad ejus expulsionem concurrat consensus rectoris et trium de septem maxime senioribus scholaribus."

I would observe that it is deprivatio as to the rector and it is expulsio as to the scholar, and although I agree the words are synonymous, yet by this statute they are differently applied. It is impossible that the consent should relate to the rector, for then he must consent to his own deprivation, and it is impossible to imagine he should so consent; for in this place the consent of three of the senior fellows is not to do, without the consent of the rector. Then the subsequent words are that if the rector is deprived by the bishop's commissary, although four of the senior fellows consent, he may appeal to the bishop. The rector has that liberty if the bishop's commissary deprives him. But where are there any words that abridge the bishop's own power? The commissary's power seems to be abridged by these words: "to have their consent"; and yet that is but by implication. But the statute has appointed no qualification of the bishop's power. Here are express words that he may proceed to the deprivation of the rector, not only by the general words of making him vistitor, but particular words for that purpose in the very statute. Then you must show some other words to qualify this power for I, for my part, can find none. I can find some that qualify the commissary's power, but none that reach the bishops'.

It is objected that it is unreasonable to imagine that the founder should give a greater authority to the visitor over the rector than the scholars. The question

A is not, what was reasonable or fit for the founder to do, but what he has done on a view and perusal of the statutes. Suppose he gives the bishop such an absolute authority, it is not in our power to control it for any imagined unreasonableness. It is to be supposed that the founder had some reason for giving the bishop such power over the rector, although if he had not, it is not material; his will is his reason in ordering and disposing of his own, and it is not in our B power to take away this authority from him because we think it unreasonable.

Then consider the rector has a benefit that the scholars have not, for if the commissary visits the college and deprives him with the consent of four senior fellows, he may have an appeal to the bishop; but the scholars can have no such appeal. It may be that the founder thought fit to trust the rector with the bishop alone, as knowing that he would take more care of the head of the college than C he would of the inferior members of it. But after all, who knows what reason a man may have? Every man is master of his own charity, to appoint and qualify it as he pleases.

If the Bishop of Exeter is, by statute in express words, made visitor of the college and has, by express words, a power given to him to proceed to the deprivation of the rector, and there are no words to lessen that power, I would fain know how D we can make such a construction as to limit this power to be with the consent of four senior fellows. So I think that by the statutes and the constitutions, the bishop being made visitor and having authority to deprive the rector, without any qualification of that authority, he may proceed to deprive him without the consent of the four senior fellows. I agree, however, that if their consent had been necessary, the suspension does not make them not fellows during the suspension, for it is E only an impediment to them from enjoying any benefit from their office, but it makes no vacancy of the office at all. For if a minster is suspended, during the suspension the place is full, and if the rector had been suspended, the rectory would have been full, and he might with the fellows have maintained an assize for the lands of the college, and he is as much rector as before. And then if a suspended fellow remained a fellow, if it were necessary for them to consent, such F a fellow is as much empowered to consent as ever he was; but I think it was not at all necessary as the case is.

The next point is no more than this, whether or not (supposing the bishop has an authority to deprive the rector and he does by sentence deprive him) the justice of this sentence be examinable in any of the courts of common law. That is, first, whether the sufficiency of the sentence as to the cause be examinable in G the common law courts. Secondly, whether the truth of that cause, suppose it to be good and sufficient to ground the sentence if true, can be inquired into or be examined. I think the sufficiency of the sentence is never to be called in question, nor any inquiry to be made here into the reasons or causes of the deprivation. If the sentence is given by him who is visitor, created so by the founder or by the law, you shall never inquire into the validity or ground of the H sentence. This will appear, if we consider the reason of a visitor and how he comes to be supported by authority in that office.

In order that we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government and such as are for private charity. Those that are for the public government of a town, city, mystery or the like, being for public I advantage, are to be governed according to the laws of the land. If they make any particular private laws and constitutions, the validity and justice of them is examinable in the King's courts. There are no particular private founders and consequently, no particular visitor of these; there are no patrons of these. Therefore, if no provision is in the charter how the succession shall continue, the law supplies the defect of that constitution and says that it shall be by election as mayor, aldermen, common council and the like. So it was in the case of the town of Launceston, 1 ROLL. ABR. 513, tit. Corporation, G. pl. 5.

Private and particular corporations for charity, founded and endowed by private

persons, are subject to the private government of those who erect them, and, A
therefore, if there is no visitor appointed by the founder, the law appoints the
founder and his heirs to be visitors who are to proceed and act according to the
particular laws and constitutions assigned them by the founder. So it appears in
Farchild v. *Gayre* (2), where it is now admitted on all hands that the founder is
patron and as founder, is visitor if no particular visitor be assigned. See also
Y.B. 8 Edw. 3, fo. 69, pl. 37; 8 Lib. Ass. placit 29, 31. So that patronage and B
visitation are necessary consequents one upon another, for this visitatorial power
was not introduced by any canons or constitutions ecclesiastical (as was said by
counsel in argument). It is an appointment of law; it arises from the property
which the founder had in the lands assigned to support the charity, and as he is
the author of the charity, the law gives him and his heirs a visitatorial power,
that is, an authority to inspect the actions and regulate the behaviour of the C
members that partake of the charity. For it is fit that the members who are
endowed and have the charity bestowed on them should not be left to themselves—
for divisions and contests will arise among them about the dividend of the charity—
but pursue the intent and design of him that bestowed it on them.

Where the poor or those that receive the charity are not incorporated but there
are certain trustees who dispose of the charity, according to the case in 10 Co. D
[*Sutton's Hospital Case* (3)] there is no visitor, because the interest of the revenue
is not vested in the poor that have the benefit of the charity, but they are subject
to the orders and direction of the trustees. But where they who are to enjoy the
benefit of the charity are incorporated, there, to prevent all perverting of the
charity or to compose differences that may happen among them, is by law a
visitatorial power; and it being a creature of the founder's own, it is reason that E
he and his heirs should have that power unless by the founder it is vested in some
other. There is no manner of difference between a college and a hospital, except
only in degree. A hospital is for those that are poor, mean, low, and sickly; a
college is for another sort of indigent persons, but it has another intent, to study
in and educate persons in learning that have not otherwise the wherewithal to do it.

Still it is as much within the reason of hospitals. Further, if in a hospital, F
the master and poor are incorporated, it is a college having a common seal to act
by, although it has not the name of a college (which always supposes a corporation)
because it is of an inferior degree. In both cases there must be a visitor, either
the founder and his heirs or one appointed by him; and both are eleemosynary.

A visitor being then, of necessity, created by the law (as Y.B. 8 Edw. 3, fo. 69,
pl. 37) every hospital is visitable either by the patron if a lay hospital, or by G
the ordinary if spiritual. What is the visitor to do? He is to judge according
to the statutes and rules of the college. He may expel and (as in 8 Lib. Ass. 29,
31) he may deprive. The only question in that case was, who was visitor? For it
is agreed on all hands that quatenus visitor he may deprive. If he is visitor as
ordinary, there lies an appeal from his deprivation, but if as patron, then none.
That deprivation, whether by right or wrong, was to stand good. H

As to the objection that it is not the sentence of a court and, therefore, not
conclusive, it is not material whether it is a court or not; all the matter is whether
the visitor has a jurisdiction. If he has a jurisdiction and cognisance of the matter
and person, and he gives sentence in the matter, his sentence must make a vacancy,
be it never so erroneous; and there is no appeal if the founder has not thought
fit to direct one. That an appeal lies to the common law courts of England is I
certainly not so. It is plain by all the authorities of our books and by the way of
pleading, that the cause of the visitor's sentence is not examinable. If a sentence
of deprivation is pleaded you need not show the cause; it is not traversable even
in a visitation, when it is by the visitatorial power; so is Rastal Entr., fol. 1,
Y.B. 11 Hen. 7, 27, and *Kenn's Case* (4).

Suppose that this rectory had been a corporation sole, and not a corporation
aggregate of rector and scholars; and Dr. Bury had brought an assize and then
this deprivation had been pleaded. I would fain know whether it would not be a

A good plea to show that the visitor had pro certis causis, etc., deprived him. Without all question it would have been a good plea and not traversable, for everything that is traversable must be expressed in certainty. It is strange that pleading a sentence without showing the cause should be good, and finding a sentence, in a special verdict without finding the cause should not be as good and conclusive to the party. I thought things had more exactly to be pleaded than B set forth in the finding of a jury on a special verdict; and if in pleading it be not traversable, the argument is the strongest that can be that the cause is not to be inquired into. For if it were, a fairer opportunity must needs be given than on a special verdict, which concludes [estops] the party as to the fact that is found.

As to the matter of there being no appeal from an arbitrary sentence, it is true the case is the harder because the party is concluded [estopped] by one judgment; C that does make it the more severe on the rector, but it does not lessen the validity of the sentence. If the constitution had been that, if the visitor deprives the rector then he might appeal to the Archbishop of Canterbury, it would have been more equitable; but in that case, if there had been any appeal and the sentence had not been reversed, then the deprivation would have been in force and irremediable in any court of law. I do not know any authority of law that makes D the sentence to be the weaker because the party deprived is barred of an appeal. In *Caudrey's Case* (5) a sentence of deprivation was given against him by the High Commission court, and there was no appeal. In *Allen* v. *Nash* (6) the sentence was found but no cause shown; yet it was held to be well enough although no appeal did lie, the sentence being in the High Commission Court.

How does EYRE, J., distinguish this case from ours here? He says that it was E by virtue of the ecclesiastical law. I would fain have anybody tell me the difference, for in one case as well as the other there is a lawful jurisdiction to deprive without appeal. If then in one case the sentence is conclusive, although there is no appeal, why by the same reason should it not be as conclusive in the other? It was so in *Bird* v. *Smith* (7), where a man was deprived for not conforming to the canons. It was certainly a very hard case, for all the canons are not according to F law, nor any of them obligatory further than as received and allowed time out of mind.

As to *Coveney's Case* (8) and *Bagg's Case* (9), that the party deprived shall have an assize when no appeal, I take the cases to be all one as to this matter, although in two books; and there being an error in the first, it was not rectified afterwards. Coveney, president of Magdalen College, was deprived by the visitor, not as G ordinary but as visitor. The question was whether an appeal would lie from the visitor's sentence to the King. It was held there could be none to the archbishop because it was not done as ordinary but as visitor. What then? Why is there this collection by the reporter: "ex hoc sequitur [says he] that Coveney who was deprived, shall have an assize." And that was the cause of the opinion of SIR EDWARD COKE, C.J., that is cited in *Bagg's Case* (9), and he there quotes Y.B. 8 H Edw. 3, fo. 69, pl. 37, and LIB. ASS. 29, 31, for such a distinction. But if there be an inspection of the book, there is no such distinction to be found; the party is concluded [estopped] in that case as well as the other.

Therefore, there is an end of that opinion, for the foundation fails and is not warranted by any authority. Besides, it is reasonable to suspect that case not to be law when the instance is impracticable which it is brought to prove. The head I of a college cannot maintain an assize for his office of headship. He does not have such estate as will bear it. Therefore, to give such an instance as in *Coveney's Case* (8) is to overthrow the authority of the case. The head of such a body cannot maintain an assize for his headship, for he has no sole seisin. The whole body of the college have an interest in the estate and he has not a title to a penny of the revenues in his own right until, by consent, they are privately divided and distributed. Then too, it is not the rector's money, it is Dr. Bury's money after division. It is a notion that cannot be maintained or supported by the rules of law; he is, indeed, the only visible person of the body, but he has no separate right.

In *Appleford's Case* (1), the like argument was used in this court, and then it was insisted that he might have an assize. SIR MATTHEW HALE, C.J., said that was impossible, and I remember well that he disallowed of that opinion of COKE. I know no difference between this case and that of a mandamus. In *Appleford's Case* (1), there was a mandamus brought to restore him to his fellowship. It was returned that by the statutes of the college they had power to turn him out for misdemeanour, that the Bishop of Winchester was visitor, that he was turned out pro crimine enormi and appealed to the bishop who had confirmed the expulsion, and the particular cause was not returned.

I know it well because I was of counsel for the college and we omitted the cause in the return for that reason, because we thought it not sufficient. It was strongly urged that we ought to show the cause of expulsion in the return to bring it within the compass of the statute. It was answered: No, there was a local visitor who had given the sentence and, be it right or wrong, the party was concluded by it; the members of the college must submit to such laws as the founder was pleased to give them. Mr. Appleford was never restored. There is an express authority to guide us in our judgment in this case.

Here a local visitor has given a sentence and, thereby, actually deprived the rector of his place; and why the law should not be the same when the case appears in a special verdict in an ejectment as in a return to a mandamus, no reason can be given. At this rate we shall always be at sea and with uncertainties, and not know when we shall come to shore. I thought we had reached some certainty at law since *Appleford's Case* (1), that where there is a visitor and he has power to proceed to deprivation, this court ought to give credit to the justice of his proceedings as much as to those of any judge. I remember that SIR MATTHEW HALE C.J., took it for clear law that such a sentence was as strong as a judgment in an assize to bind the party deprived. The visitor is made a judge and particularly designed by the founder; but he has his authority from the law and he is to judge by the statutes. The founder has trusted this particular matter to his direction, and why shall we suspect him that he will not do right?

As to the next point, suppose the cause is examinable yet the cause need not be found in the verdict—for if a deprivation be found by the jury we must presume it to be just—we are to give credit to a man that exercises judicial power if he keeps within his jurisdiction. The law has respect not only to courts of records and judicial proceedings there, but to all other proceedings where the person that gives his judgment or sentence has judicial authority, and no fault is shown in the sentence. The jury do not so much as find that the matter and ground of it is untrue or insufficient in point of law or any other fault or defect whatsoever, but it appears that the cause of deprivation is good, it being for contumacy.

If the bishop had power to visit in June, as I think he had, and was hindered by shutting the doors, whereupon he went away without doing anything, and came again in July, when he held his visitation, and they carried themselves contumaciously and refused to submit to his authority, this was contra officii sui debitum. It is by the constitution of the college inseparably incident to their places that both head and members should submit to the visitation. And contumacy is held a good cause of deprivation. It was held a good cause in *Bird* v. *Smith* (7), and *Allen* v. *Nash* (6), quod fuit refractarius.

Although this is not one of the causes mentioned in the statute of deprivation, yet when the bishop comes to make a visitation and the members refuse to submit, it is certainly contrary to that duty which their places oblige them to perform. I do not think that entering a protestation against the visitation was any fault (that was surely very lawful), but their turning their backs on the visitor, and not appearing on summons and refusing to submit to his examination, was an offence and contrary to that duty which the statutes require. For the visitor is to inquire into the state of the college and into each one's particular behaviour and conformity to the college statutes, and if he comes to make such an inquisition

A and the head or the members absent themselves or will not appear to be examined, it tends to the subversion of the whole constitution of the college, which is a good cause of deprivation. And although there is a particular statute which declares for what causes the rector should be deprived, of which this is none, yet that does not extend to a deprivation in time of visitation but it shows in what manner the college shall proceed to get the rector, if guilty of such offences, removed. B They may complain to the visitor when he is not in his visitation, if he waste his revenues or behave himself scandalously and, on request, will not resign, and they may article against him before the visitor, out of his visitation. But when he comes to execute his visitatorial power in the quinquennial visitation, he is to inquire into all the affairs of the college, and he is not to proceed in that case on the information of the fellows, but he may proceed even to deprivation wherever C he sees cause. Contumacy, I take it, is a cause of forfeiture of his office, being an offence against the very essence of his place, whereby he is subject to the power of the visitor. If he endeavours to evade or contumaciously refuses to submit to his power and authority, it is an offence against the duty of his place and a good cause of deprivation.

So that I hold in this case, first, that the Bishop of Exeter has a visitatorial D power vested in him to deprive the rector, without the consent of the senior fellows; secondly, that the justice of this sentence is not to be examined into here; and thirdly, if it were [to be examined into here] and the cause were necessary to be shown, I think contumacy is a very good cause of deprivation, being an affront to him in his visitatorial authority. Although I believe that Dr. Bury did not design to affront the bishop but to assert his right, yet ignorantia juris non excusat. E If the law is that he ought to submit, which he refuses, we cannot help it. I am far from being such a judge as shall lay any intolerable yoke on anyone's neck, but I must say that if the head and members of a college will receive a charity with a yoke tied to it by the founder, they must be contented to enjoy it in the same manner as they received it from him. If they will have one, they must submit to the other. And so my judgment ought to be given for the plaintiff, F but my brothers are all of another opinion and so I submit to it. The defendant must have his judgment.

[Although judgment was given for the defendant by the opinion of the other three judges, it was reversed on appeal by the House of Lords.]

A

SEMAYNE'S CASE

[COURT OF KING'S BENCH (Popham, C.J., Fenner, Yelverton, Williams and Gawdy, JJ.), Michaelmas Term, 1604]

[Reported 5 Co. Rep. 91 a; Cro. Eliz. 908; Moore, K.B. 668; Yelv. 29; 77 E.R. 194]

B

Execution—Forcible entry—Rights of sheriff.

In all cases when the King is party, the sheriff (if the doors are not open) may break the party's house, either to assist him or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming and to make request to open the doors.

C

In all cases when the door is open, the sheriff may enter the house and do execution at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house and distrain for his rent or service.

It is not lawful for the sheriff (on request made and denial) at the suit of a common person to break the defendant's house, scilicet, to execute any process at the suit of any subject.

D

The house of anyone is not a castle or privilege but for himself, and does not extend to protect any person who flies to his house or the goods of any other which are brought and conveyed into his house to prevent a lawful execution and to escape the ordinary process of law; in such cases after denial on request made, the sheriff may break the house.

E

Notes. Considered: *Lee* v. *Gansel* (1774), 1 Cowp. 1; *Southam* v. *Smout*, [1963] 3 All E.R. 104. Referred to: *Mackalley's Case* (1611), 9 Co. Rep. 65 b; *Oath before Justices Case* (1612), 12 Co. Rep. 130; *Bowles's Case* (1615) 11 Co. Rep. 77 b; *Cooke's Case* (1639), W.Jo. 429; *Penton* v. *Brown* (1664) 1 Keb. 698; *Ratcliffe* v. *Burton* (1802), 3 Bos. & P. 223; *Burdett* v. *Abbot* (1812), 4 Taunt. 401; *East India Co.* v. *Kynaston* (1821), 3 Bli. 153; *Aga Kurboolie Mahomed* v. *R.* (1843), 4 Moo.P.C.C. 239; *Hollier* v. *Laurie* (1846), 3 C.B. 334; *Ryan* v. *Shulcock* (1851), 7 Exch. 72; *Percival* v. *Stamp* (1853), 9 Exch. 167; *Hooper* v. *Lane* (1857), 6 H.L.Cas. 443; *Attack* v. *Bramwell* (1863), 3 B. & S. 520; *Edmondson* v. *Nuttall* (1864), 17 C.B.N.S. 280; *Harvey* v. *Harvey*, [1881–5] All E.R.Rep. 1129; *American Concentrated Must Corpn.* v. *Hendry* (1893), 62 L.J.Q.B. 388; *Long* v. *Clarke* (1893), 63 L.J.Q.B. 108; *Hodder* v. *Williams* [1895] 2 Q.B. 663; *Grunnell* v. *Welch* (1905), 74 L.J.K.B. 925.

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As to particular forms of execution, see 16 HALSBURY'S LAWS (3rd Edn.) 40 et seq.; and for cases see 21 DIGEST (Repl.) 558 et seq.

Action on the case for disturbing the making of an execution.

The defendant, Richard Gresham, and one George Berisford, were joint tenants of a house in Blackfriars in London for years. George Berisford acknowledged a recognisance in the nature of a statute staple to the plaintiff, Peter Semayne, and, being possessed of divers goods in the house, died, by which the defendant was possessed of the house by survivorship in which the goods continued and remained. The plaintiff sued process of extent on the statute to the sheriffs of London. The sheriffs returned the cognizor dead, on which the plaintiff had another writ to extend all the lands which he had at the time of the statute acknowledged, or at any time after, and all his goods which he had at the day of his death; which writ the plaintiff delivered to the sheriffs of London and told them that divers goods which were George Berisford's at the time of his death, were in the house. The sheriffs, by virtue of the writ, charged a jury to make inquiry according to the writ, and the sheriffs and jury came to the door of the house to serve the execution, and they offered to enter the house to appraise the goods according to the writ. The defendant præmissorum non ignarus, intending to disturb the execution, shut the door of his house against them whereby they could not come and appraise

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I

A the goods, nor the sheriff seize them, by which he lost the benefit and profit of his writ.

SIR EDWARD COKE, in his report, said that the court resolved the following points: (i) That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although B the life of man is a thing precious and favoured in law so that, although a man kills another in his defence, or kills one per infortunium [by misfortune] without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels* for the great regard which the law has to a man's life, but if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house it is not felony, and he shall lose C nothing, and therewith agree 3 Edw. 3 Coron. 303 and 305, and 26 Lib. Ass. pl. 23. So it is held in Y.B. 21 Hen. 7, fo. 39, pl. 50, everyone may assemble his friends and neighbours to defend his house against violence; but he cannot assemble them to go with him to the market or elsewhere for his safeguard against violence; and the reason of all this is because domus sua cuique est tutissimum refugium [his own house is the safest place of refuge].

D (ii) That when any house is recovered by any real action or by ejectione firmæ, the sheriff may break [into] the house and deliver the seisin or possession to the demandant or plaintiff for the words of the writ are habere facias seisinam, or possessionem, etc., and after judgment it is not the house in right and judgment of law of the tenant or defendant.

(iii) That in all cases when the King is party, the sheriff (if the doors be not E open) may break [into] the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks [into] it, he ought to signify the cause of his coming and to make request to open the doors. That appears well by the Statute of Westminster the First (1275), c. 17 [repealed] (which is but an affirmance of the common law), as hereafter appears, for the law without a default in the owner abhors the destruction or breaking [into] F of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party when no default is in him; for perhaps he did not know of the process of which, if he had notice, it is to be presumed that he would obey it. That appears by the book in 18 Edw. 2, Execut. 252, where it is said that the King's officer who comes to do execution, etc., may open the doors which are shut, and break them, if he cannot have the keys; which proves that he G ought first to demand them: Y.B. 7 Edw. 3, fo. 16, pl. 15. J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J. retreats into the house of T. They who pursue him, if the house be kept and defended with force (which proves that first request ought to be made) may lawfully break [into] the house of T., for it is at the King's suit: 27 Lib. Ass. pl. 66. The King's bailiff may distrain for issues in a sanctuary: 27 (28) Lib. Ass. pl. 35. By force H of a capias on an indictment of trespass the sheriff may break [into] his house to arrest him; but in such case, if he breaks [into] the house when he may enter without breaking [into] it (that is, on request made, or if he may open the door without breaking [in]), he is a trespasser: 41 Lib. Ass. 15. On issue joined on a traverse of an office in Chancery, venire facias was awarded returnable in the King's Bench without mentioning non omittas propter aliquam libertatem; yet forasmuch I as the King is party, the writ of itself is non omittas propter aliquam libertatem: Y.B. 9 Edw. 4, 9. For felony or suspicion of felony the King's officer may break [into] the house to apprehend the felon, and that for two reasons: (a) for the commonwealth, for it is for the commonwealth to apprehend felons; (b) in every felony the King has interest, and where the King has interest the writ is non

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* But see Offences Against the Person Act, 1861, s. 7 (5 Halsbury's Statutes (2nd Edn.) 790) now repealed by the Criminal Law Act 1967, Sched. 3, part 1.

omittas propter aliquam libertatem; and so the liberty or privilege of a house does not hold against the King. A

(iv) That in all cases when the door is open, the sheriff may enter the house and do execution at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house and distrain for his rent or service: YEAR BOOKS 38 Hen. 6, 26 a.; 8 Edw. 2, Distr. 21; and 33 Edw. 3, Avow. 256. The lord may distrain in the house although lands are also held in which he may distrain: vide 29 LIB. ASS. 49. But the great question in this case was if by force of a capias or fieri facias at the suit of the party, the sheriff, after request made to open the door and denial made, might break [into] the defendant's house to do execution if the door is not opened. It was objected that the sheriff might well do it for divers causes: (a) because it is by process of law; and it was said that it would be granted on the other side that a house is not a liberty, for if a fieri facias or a capias be awarded to the sheriff at the suit of a common person and he makes a mandate to the bailiff of a liberty who has return of writs who nullum dedit response, in that case another writ shall issue with non omittas propter aliquam libertatem. Yet it will be said on the other side that he shall not break [into] the defendant's house as he shall do of another liberty, for whereas in the county of Suffolk there are two liberties, one of St Edmund Bury and the other of St. Etheldred of Ely, suppose a capias comes at the suit of A. to the sheriff of Suffolk to arrest the body of B. and the sheriff makes a mandate to the bailiff of the liberty of St. Etheldred who makes no answer; in that case the plaintiff shall have a writ of non omittas, and by force thereof he may arrest the defendant within the liberty of Bury, although no default was in him; (b) admitting it to be a liberty, the defendant himself shall never take advantage of a liberty; as if the bailiff of a liberty be defendant in any action, and process of capias or fieri facias comes to the sheriff against him, the sheriff shall execute the process against him, for a liberty is always for the benefit of a stranger to the action: (c) for necessity the sheriff shall break [into] the defendant's house after such denial as is aforesaid, for at the common law a man should not have any execution for debt but only of the defendant's goods. Suppose, then, the defendant would keep all his goods in his house and so the defendant himself by his own act would prevent not only the plaintiff of his just and true debt, but there would also be a great imputation to the law that there should be so great a defect in it, that in such case the plaintiff by such shift without any default in him should be barred of his execution. And the book in 18 Edw. 2 Execut. 252 was cited to prove it, where it is said that it is not lawful for anyone to disturb the King's officer who comes to execute the King's process; for if a man might stand out in such manner a man would never have execution, but there it appears (as has been said) that there ought to be request made before the sheriff breaks [into] the house: (d) the sheriffs were officers of great authority in whom the law reposed great trust and confidence, and are to be of sufficiency to answer for all wrongs which should be done; and they had custodia comitatem, and, therefore, it should not be presumed that they would abuse the house of anyone by colour of doing their office in execution of the King's writs against the duty of their office and their oath also. B C D E F G H

But it was resolved that it is not lawful for the sheriff (on request made and denial) at the suit of a common person to break [into] the defendant's house, scilicet, to execute any process at the suit of any subject, for thence would follow great inconvenience that men as well in the night as in the day should have their houses (which are their castles) broken into, by colour whereof great damage and mischief might ensue; for by colour thereof, on any feigned suit, the house of any man at any time might be broken into when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses. And although the sheriff is an officer of great authority and trust, yet it appears by experience that the King's writs are served by bailiffs, persons of little or no value; and it is not to be presumed that all the substance a man has in his house, I

A nor that a man would lose his liberty which is so inestimable, if he has sufficient to satisfy his debt.

And all the said books which prove that, when the process concerns the King, the sheriff may break [into] the house, imply that at the suit of the party the house may not be broken [into], otherwise the addition (at the suit of the King) would be frivolous. And with this resolution agrees the book in Y.B. 13 Edw. 4, B fo. 9, pl. 4. The express difference there taken between the case of felony, which (as has been said) concerns the commonwealth, and the suit of any subject, which is for the particular interest of the party, as there it is said in Y.B. 18 Edw. 4, fo. 4, pl. 19, by LITTLETON and all his companions that it is resolved that the sheriff cannot break [into] the defendant's house by force of a fieri facias but he is a trespasser by the breaking, and yet the execution which he then does in the house C is good. It was said that the book of 18 Edw. 2 was but a short note and not any case judicially adjudged and it does not appear at whose suit the case is intended, but it is an observation or collection (as it seems) of the reporter. And if it be intended of a quo minus or other action in which the King is party or is to have benefit, the book is good law.

(v) That the house of anyone is not a castle or privilege but for himself, and D shall not extend to protect any person who flies to his house or the goods of any other which are brought and conveyed into his house to prevent a lawful execution and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there, and, therefore, in such cases after denial on request made, the sheriff may break [into] the house. That is proved E by the First Statute of Westminster, c. 17 [repealed], by which it is declared that the sheriff may break [into] a house or castle to make replevin when the goods of another which he has distrained are by him conveyed to his house or castle to prevent the owner to have a replevin of his goods; which Act is but an affirmance of the common law in such points. But it appears there that, before the sheriff in such case breaks [into] the house, he ought to demand the goods to be F delivered to him, for the words of the statute are: "After that the cattle shall be solemnly demanded by the sheriff's, etc."

(vi) That admitting that the sheriff after denial might have broken into the house, as the plaintiff's counsel pretend he might, then it follows that he has not done his duty, for it does not appear that he made any request to open the door of the house. Also the defendant, as this case is, has done that which he might well do by the G law, scilicet, to shut the door of his own house.

Lastly, the general allegation præmissorum non ignarus was not sufficient in this case where the notice of the premises is so material; but in this case it ought to have been certainly and directly alleged; for without notice of the process of law and of the coming of the sheriff with the jury to execute it, the shutting of the door of his own house was lawful. Judgment was given against the plaintiff.

H *Judgment for defendant.*

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POMFRET *v.* RICROFT

[Court of King's Bench (Kelyng, C.J., Rainsford, Morton and Twysden, JJ.), Hilary Term, 1669]

[Court of Exchequer Chamber (Vaughan, C.J., Hale, C.B., Turnour, Archer, Wilde and Littleton, JJ.), Michaelmas Term, 1669] B

[Reported 1 Wms. Saund. 321; 2 Keb. 543, 569; 1 Sid. 429; 1 Vent. 26, 44; 85 E.R. 454]

Easement—Repair of subject-matter—Obligation of grantor—Right of grantee to repair.

R. demised to P. a house and a piece of land excepting some land on which C there was a pump, with the right to use the pump in common with R.'s other tenants. On the pump falling into disrepair, P. brought an action of covenant against R., alleging that there was an implied obligation to repair from the word "demisit." The defendant demurred. The Court of King's Bench gave judgment for the plaintiff. On appeal to the Court of Exchequer Chamber,

Held: allowing the appeal, that the lessor was not liable in covenant for D nonfeasance, although he would have been liable in an action on the case if he had actively damaged the pump, but that the lessee was entitled, as an incident of the grant, himself to repair it.

Notes. Considered: *Hinchliffe* v. *Kinnoul* (1838), 5 Bing.N.C. 1; *Colebeck* v. *Girdlers Co.* (1876), 1 Q.B.D. 234; *Goodhart* v. *Hyett* (1883), 25 Ch.D. 182; *Buckley* v. *Buckley*, [1898] 2 Q.B. 608. Explained: *Pwllbach Colliery Co.* v. *Woodman*, E [1914–15] All E.R.Rep. 124. Referred to: *Rhodes* v. *Bullard* (1806), 7 East, 116; *Hodgson* v. *Field* (1806), 7 East 613; *Seddon* v. *Senate* (1810), 13 East 63; *Doe d. Douglas* v. *Lock*, [1835–42] All E.R.Rep. 13; *Blakesley* v. *Wheldon* (1841), 1 Hare, 176; *Carstairs* v. *Taylor* (1871), L.R. 6 Exch. 217; *Winch* v. *Thames Conservators* (1872), L.R. 7 C.P. 458; *Serff* v. *Acton Local Board* (1886), 31 Ch.D. 679; *Jones* v. *Pritchard*, [1908–10] All E.R.Rep. 80; *Schwann* v. *Cotton*, [1916] 2 Ch. 120; *Sack* F v. *Jones*, [1925] All E.R.Rep. 514; *Ellis* v. *Noakes*, [1930] All E.R.Rep. 382; *Jones* v. *Price*, [1965] 2 All E.R. 625.

As to the extent of the burden of an easement on the servient tenement, see 12 Halsbury's Laws (3rd Edn.) 521; and for cases see 19 Digest (Repl.) 13 et seq.

Appeal by the defendant from a decision of the Court of King's Bench on a G demurrer by the defendant to the declaration in an action for breach of covenant.

By a lease made between the defendant Ricroft and the plaintiff Pomfret, Ricroft demised to Pomfret for 31 years a house and a piece of land in the parish of St. Leonard, Shoreditch, in the county of Middlesex, except a small piece at the south-west corner on which a pump stood, together with all ways, etc., and with the use and occupation of the pump in common with Ricroft's other tenants in that place. H The plaintiff alleged that on Sept. 29, 1665, which was before the expiration of the term, the defendant had permitted the pump to become "in decay, broken, ruinous, prostrate and totally spoiled" and its fountain choked with earth, mud and rubbish, and had allowed it to remain in the same condition ever since, whereby the plaintiff could not have the use and occupation of the pump, according to the form and effect of the lease, in breach of his covenant. The defendant demurred. I

Simpson for the defendant.
Jones for the plaintiff.

KELYNG, C.J., RAINSFORD and **MORTON, JJ.,** said that the action well lay on this ground, namely, that when the use of a thing is demised and the thing falls to decay, so that the lessee cannot have the use and benefit of it, he shall have his action of covenant therefore on the word demisit, which raises a covenant in law. The lessee himself cannot repair it, not having any interest either in the pump

A or in the land upon which it stands; for it appears that the land where the pump stands was specially excepted out of the lease, so that no interest therein passed to the lessee who is the plaintiff. If then the lessor will not repair it, he not only avoids his own grant, but the lessee will also be deprived of the benefit which he ought to have, and which perhaps induced him to give a greater fine or rent for a lease of his house; and yet he cannot help himself, but will be wholly without B remedy unless this action of covenant lies. If a man grants by deed a watercourse, if the grantor stops it, the grantee shall have an action of covenant against him. So if a lease be made of a house and estovers, and the lessor destroy all the wood out of which the estovers were to be taken, the lessee shall have an action of covenant against the lessor.

C **RAINSFORD, J.:** If a man demise by deed a middle room in a house and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor.

Wherefore they held that the plaintiff should have judgment.

TWYSDEN, J., dissenting totis viribus, agreed to the cases above put, that D where a man grants a watercourse and afterwards stops it, or demises a house and estovers and afterwards destroys the wood, in such cases the party grieved shall have his remedy by action of covenant; for these are wilful acts of the lessor or grantor, and it is a misfeasance in him to annul or avoid his own grant. But in this case there is no misfeasance, but only a nonfeasance, for which no action lies. As in the case where I grant a way over my land, I shall not be bound to repair E it, but if I voluntarily stop it, an action lies against me for the misfeasance; but for the bare nonfeasance, viz., in not repairing it when it is out of repair, no action at all lies. But if any action had been maintainable, it would be rather an action upon the case than action of covenant. As if the lessor enter upon the lands leased and cut down the timber trees and carry them away, whereby the lessee will lose the loppings and shade of them, he cannot have covenant, though he may F have an action of trespass or upon the case for his special damage. Further, covenant does not lie but for an actual ouster of the land demised, and in such action the possession shall be recovered as in an ejectment: FITZ. ABR., Covenant, 23, Judgment, 177. In this case the plaintiff himself being the lessee might have repaired the pump; for although neither the soil itself nor the pump be granted to him, yet by the grant of the use of the pump the law has given to him this liberty; G for when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.

Judgment for plaintiff.

H The defendant appealed to the Court of Exchequer Chamber.

VAUGHAN, C.J., HALE, C.B., TURNER [TURNOUR], ARCHER, WYLD [WILDE] and **LITTLETON, JJ.,** in the Exchequer Chamber unanimously reversed the judgment of the King's Bench for the reasons given by TWYSDEN, J.

HALE, C.B.: If I lend a piece of plate and covenant by deed that the party I to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without my fault, no action of covenant lies against me.

Appeal allowed.

SPENCER'S CASE

[Court of Queen's Bench (Wray, C.J., Gawdy, J., and other judges), Easter Term, 1583]

[Reported 5 Co. Rep. 16a; 77 E.R. 72]

Landlord and Tenant—Covenant—Covenant by lessee to build wall on land demised—Assignment of term—Obligation of assignee.

A lessee by indenture covenanted for himself, his executors and administrators, that he, his executors or assigns, would build a brick wall on part of the land demised.

Held: if the lessee assigned his term, the covenant did not bind his assignee.

Resolved: 1. Where a covenant relates to a thing in esse, parcel of the demise, such covenant runs with the land and binds the assignee, although he is not bound by express words. 2. If the lessee makes a covenant for himself and his assigns that relates to a thing in futuro and directly touches or concerns the thing demised, the assignee, if named, is bound by such covenant. But the assignee, although named, is not bound by a covenant to do something which is merely collateral and which in no manner touches or concerns the thing demised and assigned over. 3. If a man leases personal goods and the lessee covenants for him and his assigns at the end of the time to deliver the same in as good condition as when let, such covenant is but a personal contract and does not bind the assignees. 4. If a feoffment is made by the word "dedi", the assignee of the feoffee shall not vouch. But if a lease for years is made by the word "concessi" or "demisi" [which imply a covenant], the assignee of the lessee, on eviction, may have a writ of covenant. 5. Tenant by the curtesy, or any other who comes in the post, shall not vouch; but in the case of a ward granted by deed to a woman, who takes husband and dies, the husband shall vouch by force of the word "grant," so the husband of a feme lessee for years, after her death, shall have an action of covenant as well on the covenant in law on the words "demise or grant," as on the express covenants contained in the lease. So tenant by statute-merchant or statute-staple or elegit of a term, and the vendu [seller] of a lease by force of any execution shall have an action of covenant in such case as a thing annexed to the land. 6. A covenant to repair [houses] runs with the land. 7. The assignee of the assignee, and the executors of the assignee of the assignee shall have an action of covenant.

Notes. In the old law of real property, warranty was an obligation by the feoffor or donor of land to defend the feoffee or donee in the possession of the land and to give him land of equal value if he was evicted from it. A warranty was a real covenant. Warranty by voucher was where a person was being sued for the recovery of land held by him called into court the person who had warranted the land to him and required him either to defend the title against the demandant or to yield him land of equal value. Real actions were abolished by the Real Property Limitation Act, 1833, s. 36, and the proceeding by voucher no longer exists. Warfantia cartae was a real action which lay to enforce a warranty of title to land where the tenant was unable to avail himself of the warranty by voucher. It also was abolished by the 1833 Act, s. 36.

Considered: *Uxbridge* v. *Staveland* (1747), 1 Ves. Sen. 56; *Bally* v. *Wells* (1769), Wilm. 341. Applied: *Tatem* v. *Chaplin* (1793), 2 Hy. Bl. 133. Considered: *Newman* v. *Anderton* (1806), 2 Bos. & P.N.R. 224. Applied: *Vernon* v. *Smith*, [1814–23] All E.R.Rep. 677. Considered: *Easterby* v. *Sampson* (1830), 6 Bing. 644; *Keppell* v. *Bailey*, [1824–34] All E.R.Rep. 10. Applied: *Hemmingway* v. *Fernandez* (1842), 12 L.J.Ch. 130; *Doughty* v. *Bowman* (1848), 11 Q.B. 444. Considered: *Thomas* v. *Hayward*, [1861–73] All E.R.Rep. 290. Applied: *Gower* v.

Postmaster-General (1887), 57 L.T. 527; *Dewar* v. *Goodman*, [1908–10] All E.R.Rep. 188. Considered: *Ricketts* v. *Enfield*, [1909] 1 Ch. 544; *Re Stephenson, Poole* v. *The Company*, [1914–15] All E.R.Rep. 1107. Referred to: *Attoe* v. *Hemmings* (1614), 2 Bulst. 281; *Kitchin and Knight* v. *Bunkley* (1663), 1 Keb. 565, 572; *Lougher and Williams* (1614), 2 Lev. 92; *Pomfret* v. *Ricroft* (1669), 2 Keb. 569; *Brewster* v. *Kitchell* (1697), 1 Salk. 198; *London City* v. *Richmond* (1701), 2 Vern. 421; *Ryall* v. *Rolle* (1749), post p. 82; *Knipe* v. *Palmer* (1760), 2 Wils. 130; *Grey* v. *Cuthbertson* (1785), 2 Chit. 482; *Canham* v. *Rust* (1818), 2 Moore, C.P. 164; *Vyvyan* v. *Arthur*, [1814–23] All E.R.Rep. 349; *Flight* v. *Glossop* (1835), 2 Bing.N.C. 125; *Wollaston* v. *Hakewill* (1841), 3 Man. & G. 297; *Williams* v. *Burrell* (1845), 1 C.B. 402; *Martyn* v. *Clue* (1852), 18 Q.B. 661; *Martyn* v. *Williams* (1857), 1 H. & N. 817; *Minshull* v. *Oakes* (1858), 2 H. & N. 793; *Irving* v. *Cuthbertson* (1860), 3 L.T. 335; *Wilkinson* v. *Rogers* (1863), 3 New Rep. 145; *Wilson* v. *Hart* (1865), 2 Hem. & M. 551; *Hooper* v. *Clark* (1867), 8 B. & S. 150; *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739; *Morland* v. *Cook* (1868), L.R. 6 Eq. 252; *Stevens* v. *Copp* (1868), L.R. 4 Exch. 20; *Baily* v. *Baily* v. *De Crespigny*, [1861–73] All E.R.Rep. 332; *West* v. *Dobb* (1869), 38 L.J.Q.B. 289; *Cooke* v. *Chilcott* (1876), 3 Ch.D. 694; *Haywood* v. *Brunswick Building Society* (1881), 8 Q.B.D. 403; *London and South Western Rail. Co. v. Gomm*, [1881–5] All E.R.Rep. 1190; *Andrew* v. *Aitken* (1882), 22 Ch.D. 218; *Lybbe* v. *Hart* (1885), 29 Ch.D. 8; *Formby* v. *Baker* [1900–3] All E.R.Rep. 445; *Davis* v. *Town Properties Investment Corpn., Ltd.*, [1900–3] All E.R.Rep. 558; *Wilkes* v. *Spooner*, [1911] 2 K.B. 473; *Long* v. *Gray* (1913), 58 Sol. Jo. 46; *L.C.C.* v. *Allen*, [1914] 3 K.B. 642; *Moss' Empires, Ltd.* v. *Olympia (Liverpool), Ltd.*, [1939] 3 All E.R. 460; *Re Rutherford's Conveyance*, [1938] 1 All E.R. 495; *Griffith* v. *Pelton*, [1957] 3 All E.R. 75; *Jones* v. *Price*, [1965] 2 All E.R. 625.

As to covenant running with the land, see 23 Halsbury's Laws (3rd Edn.) 644–651; and for cases see 31 Digest (Repl.) 153, 154.

Cases referred to:

(1) *Pakenham* v. *Prior of* —— (1368), Y.B. 42 Edw. 3, fo. 3, pl. 14; sub nom. *Pakenham's Case*, Co. Litt. 385a; 40 Digest (Repl.) 339, *2765*.

(2) *Horne's Case* (1400), Y.B. 2 Hen. 4, fo. 6, pl. 25.

(3) *Simon Simeon's Case* (1356), 30 Edw. 3, fo. 14.

Action for breach of covenant to build a wall.

The plaintiffs, Spencer and his wife, by deed indented, demised a house and certain land (in the right of the wife) to S. for term of 21 years. By the indenture S. covenanted for himself, his executors and administrators, with the plaintiffs that he, his executors, administrators or assigns, would build a brick wall on part of the land demised, etc. S. assigned over his term to J., and J. to the defendant, Clark. The plaintiff brought the action of covenant against the defendant as assignee, for not building the brick wall.

SIR EDWARD COKE, in his report, said that after many arguments at the Bar, the case was argued and debated by the justices at the Bench, and certain points were unanimously resolved by Sir Christopher Wray, C.J., Sir Thomas Gawdy and the whole court. Many differences were taken and agreed, he said, concerning express covenants and covenants in law, and which of them run with the land, and which of them were collateral, and did not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound although he was expressly named, and where not. The court, he continued, resolved as follows:

1. When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land and shall bind the assignee although he is not bound by express words. But when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being. As [for example] if the lessee

covenants to repair the houses demised to him during the term, that is parcel of the contract and extends to the support of the thing demised, and, therefore, is quodammodo annexed appurtenant to houses, and shall bind the assignee although he is not bound expressly by the covenant; but in the case at Bar, the covenant concerns a thing which was not in esse at the time of the demise made but to be newly built after, and, therefore, shall bind the covenantor, his executors or administrators and not the assignee, for the law will not annex the covenant to a thing which has no being.

2. In this case, if the lessee had covenanted for himself and his assigns, that they would make a new wall on some part of the thing demised, that for as much as it was to be done on the land demised, that it should bind the assignee; for although the covenant extends to a thing to be newly made, yet it is to be made on the thing demised and the assignee is to take the benefit of it, and, therefore [it] shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns by express words, the assignee shall take benefit of it and shall have a warrantia chartæ: FITZHERBERT'S NATURA BREVIUM, 135 and Y.B. 9 Edw. 2 Garranty de Charters 30 [sic., see p. 292]; Y.B. 36 Edw. 3 Garr. 1; 1 DYER, 1. But although the covenant is for him and his assigns, yet if the thing to be done is merely collateral to the land and does not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house on the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee because it is merely collateral and in no manner touches or concerns the thing that was demised or that is assigned over; and, therefore, in such case, the assignee of the thing demised cannot be charged with it, no more than any other stranger.

3. If a man leases sheep or other stock of cattle or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things let were or such price for them and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is no privity or any reversion, but merely a thing in action in the personalty which cannot bind any but the covenantor, his executors or administrators who represent him.

The same law applies if a man demises a house and land for years with a stock or sum of money rendering rent, and the lessee covenants for him, his executors, administrators and assigns, to deliver the stock or sum of money at the end of the term. The assignee shall not be charged with this covenant, for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only. Therefore, as to the stock or sum, the covenant is personal and shall bind the covenantor, his executors and administrators and not his assignee; and it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted or otherwise consumed or destroyed by the lessee, and, therefore, the law cannot determine at the time of the lease made, that such covenant shall bind the assignee.

4. If a man makes a feoffment by this word "dedi," which implies a warranty, the assignee of the feoffee shall not vouch. But if a man makes a lease for years by this word "concessi" or "demisi," which implies a covenant, if the assignee of the lessee is evicted, he shall have a writ of covenant, for the lessee and his assignee have the yearly profits of the land which shall grow by his labour and industry for an annual rent. And, therefore, it is reasonable that when he has applied his labour and employed his cost on the land, and is evicted (whereby he loses all), he shall take such benefit of the demise and grant as the first lessee might, and the lessor has no other prejudice than what his especial contract with the first lessee has bound him to.

5. Tenant by the curtesy, or any other who comes in in the post, shall not

vouch (which is in lieu of an action). But if a ward be granted by deed to a woman who takes husband, and the woman dies, the husband shall vouch by force of this word "grant," although he comes to it by act in law. So if a man demise or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words ("demise" or "grant") as on the express covenant.

The same law is of tenant by statute-merchant or statute-staple, or elegit of a term, and he to whom a lease for years is sold by force of any execution, shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law; as [for example] if a man grants to lessee for years that he shall have so many estovers as will serve to repair his house, or as he shall burn in his house or the like during the term, it is as appurtenant to the land and shall go with it as a thing appurtenant into whose hands soever it shall come.

6. If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goes with the land into whose hands soever the term shall come, as well those who come to it by act in law as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenants when the lessee makes it with the lessor.

7. The assignee of the assignee should have an action of covenant. So of the executors of the assignee of the assignee and so of the assignees of the executors or administrators of every assignee; for all are comprised within this word "assignees" for the same right which was in the testator or intestate shall go to his executors or administrators. [For example] if a man makes a warranty to one, his heirs and assigns, the assignee of the assignee shall vouch, and so shall the heirs of the assignee. The same law of the assignee of the heirs of the feoffee, and of every assignee. So every one of them shall have a writ of Warrantia Chartæ (vide Year Books 14 Edw. 3 Garr. 33; 38 Edw. 3, 21; 36 Edw. 3 Garr. 1; 13 Edw. 1 Garr. 93; 19 Edw. 2 Garr. 85), for the same right which was in the ancestor, shall descend to the heir in such case without express words of the heirs of the assignees.

Sir Edward Coke, then said: Observe reader your old books, for they are the fountains out of which these resolutions issue, but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them.

For example, in Y.B. 42 Edw. 3, fo. 3 [*Pakenham* v. *Prior of* —— (1)] the case is: [There were] grandfather, father and two sons. The grandfather was seised of the manor of D. whereof a chapel was parcel. A prior, with the assent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the manor and his servants, etc. The grandfather did enfeoff one of the manor in fee, who gave it the younger son and his wife in tail. It was adjudged that the tenants in tail, as terre-tenants (for the elder brother was heir) should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said.

Finchden related that he had seen it adjudged that two coparceners made partition of land, and one did covenant with the other to acquit him of suit which was due, and that coparcener to whom the covenant was made did alien, and the suit was arrear; and that the feoffee brought a writ of covenant against the coparcener to acquit him of the suit. The writ was [held to be] maintainable, notwithstanding he was a stranger to the covenant, because the acquittal fell on the land. But if such covenant were made to say divine service in the chapel of

another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel because the chapel does not belong to the covenantee, as it is adjudged in Y.B. 2 Hen. 4, fo. 6. pl. 25 [*Horne's Case* (2)]. There it is agreed, however, that if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D. and inhabitants therein, the covenant should be annexed to the manor, and there the terre-tenant should have the action of covenant without privity of blood.

Vide Y.B. 29 Edw. 3, 48; and Y.B. 30 Edw. 3, 14, *Simon Simeon's Case* (3), where the case was that the Lady Bardolffe by deed granted a ward to a woman who married Simon Simeon against whom the Queen brought a writ of right of ward, and they vouched the Lady Bardolffe. Afterwards the wife died by which the chattel real survived to the husband (and resolved that the writ should not abate) the vouchee appeared and said: "What have you to bind me to warranty?" The husband showed how that the lady granted to his wife before marriage the said ward. The vouchee demanded judgment for two causes: (i) Because no word of warranty was in the deed; as to that it was adjudged that the word "grant" in this case of grant of a ward (being a chattel real) did import in itself a warranty. (ii) Because the husband was not assignee to the wife nor privy. As to that, it was adjudged that he should vouch, for this warranty implied in this word "grant" is in case of a chattel real so annexed to the land that the husband who comes to it by act in law, and not as assignee, should take the benefit of it.

But it was resolved by **WRAY, C.J.,** and the whole court that this word "concessi" or "demisi" in case of freehold or inheritance does not import any warranty: 11 Hen. 6, 31, acc', vide 6 Hen. 4; 12 Hen. 4, 5; 1 Hen. 5, 2; 25 Hen. 8, Covenant Br. 32; 1 Dyer, 28; 48 Edw. 3, 22; F.N.B. 145, C. 146 and 181; Dyer 257; 26 Hen. 8, 3; 5 Hen. 7, 18; 32 Hen. 6, 32; 22 Hen. 6, 51; 18 Hen. 3, Covenant 30; Old N.B. Covenant; 46 Hen. 3, 4; 38 Edw. 3, 24. See the statute of 32 Hen. 8, c. 34 [Grantees of Reversions Act, 1540: repealed by Law of Property Act, 1925, s. 207, Sched. 7], which Act was resolved to extend to covenants which touch or concern the thing demised and not to collateral covenants.

A

LIFORD'S CASE

[Court of King's Bench (Sir Edward Coke, C.J., Doderidge and Houghton, JJ.), Michaelmas Term, 1614]

[Reported 11 Co. Rep. 46 b; 1 Roll. Rep. 95; 77 E.R. 1206]

B *Landlord and Tenant—Lease—Reservation—Timber trees—Right of lessor to enter demised premises to cut and carry away—Limit of exception of soil.* An exception in a lease of "timber trees" refers only to the trees themselves. It does not except the soil save what is required to afford sufficient nutriment to sustain the life of the trees. The exception carries with it the right to do C all things necessary to enable the lessor to cut, carry away, and sell the timber. The lessee is entitled to the pasture under the trees, and the shade for his cattle.

Landlord and Tenant—Fixtures—Articles essential to use of premises—Keys, doors, windows. Where a thing is essential to the use of a building it remains a fixture D although it is temporarily removed from the premises, e.g., if a miller takes a millstone out of the mill to pick it so that it grinds the better. Doors, windows, keys and similar things pass with the house although they are removable from it.

Notes. Followed: *Bowles's Case* (1615), 11 Co. Rep. 77 b. Applied: *Whistler* v. *Paslow* (1618), Cro. Jac. 487. Considered: *Jefferson* v. *Bishop of Durham* E (1797), 1 Bos. & P. 105; *Herring* v. *St. Paul* (1819), 3 Swan. 489; *Place* v. *Fagg* (1829), 4 Man. & Ry.K.B. 277; *Legh* v. *Heald* (1830), 1 B. & Ad. 622. Followed: *Hewitt* v. *Isham* (1851), 7 Exch. 77. Applied: *Walmsley* v. *Milne* (1859), 7 C.B.N.S. 115. Followed: *Goodhart* v. *Hyett* (1883), 25 Ch.D. 182. Applied: *Re Londesborough*, *Spicer* v. *Londesborough*, [1923] 1 Ch. 500. Referred to: *Magdalen College Case* (1616), *post*; *Smith* v. *Bole* (1618), Cro. Jac. 458; F *Barry* v. *Heard* (1622), Cro. Car. 242; *Bishop of St. David's* v. *Lucy* (1696), 1 Ld. Raym. 539; *Rosewell* v. *Prior* (1701), 1 Ld. Raym. 713; *Bradley* v. *Stratchy* (1740), Barn. Ch. 399; *Walter* v. *Tryon* (1751), Amb. 130; *Paul* v. *Paul* (1752), 1 Wm. Bl. 254; *Goodtitle d. Paul* v. *Paul* (1760), 2 Burr. 1089; *Ford* v. *Racster* (1815), 4 M. & S. 130; *Garland* v. *Carlisle* (1837), 11 Bli. 421; *Hey* v. *Moorhouse* (1839), 6 Bing.N.S. 52; *Hellawell* v. *Eastwood* (1851), 6 Exch. 295; *Hewitt* v. *Isham* G (1851), 7 Exch. 77; *Elliott* v. *Bishop* (1854), 10 Exch. 496; *Barnett* v. *Guilford* (1855), 11 Exch. 19; *Mather* v. *Fraser* (1856), 2 K. & J. 536; *Bailey* v. *Stephens* (1862), 12 C.B.N.S. 91; *Delacherois* v. *Delacherois* (1864), 4 New Rep. 501; *Sumner* v. *Bromilow* (1865), 11 Jur.N.S. 481; *Re Thomas*, *Ex parte Willoughby D'Eresby* (1881), 44 L.T. 781; *Eastern Construction Co.* v. *National Trust Co. and Schmidt*, [1914] A.C. 197; *Kursell* v. *Timber Operators and Contractors* (1926), 95 L.J.K.B. H 569.

As to fixtures and right to timber on leased property, see 23 Halsbury's Laws (3rd Edn.) 489–499, 500–503. For cases see 2 Digest (Repl.) 85 et seq.; 31 Digest (Repl.) 199 et seq.

Cases referred to:

I (1) *Abbot of Tore's Case* (circa 1443), Y.B. 21 Hen. 6, fo. 46, pl. 23.
(2) *Anon.* (1472), Y.B. 12 Edw. 4, fo. 8, pl. 20; 2 Digest (Repl.) 99, *647*.
(3) *Anon.* (1498), Y.B. 13 Hen. 7, fo. 9, pl. 4; 2 Digest (Repl.) 141, *1090*.
(4) *Anon.* (1370), 44 Edw. 3, fo. 44, pl. 58; 2 Digest (Repl.) 103, *697*.
(5) *Dauntsey* v. *Southwell* (1560), 2 Dyer, 184.
(6) *Fulmerston* v. *Steward* (1554), 1 Plowd. 101; 1 Dyer, 103a; 75 E.R. 160; 13 Digest (Repl.) 286, *1046*.
(7) *Ive* (*Ives*) v. *Sams* (*Sammes*) (1597), Cro. Eliz. 521; 2 And. 51; 78 E.R. 770; sub nom. *Ive's Case*, 5 Co. Rep. 11a; 2 Digest (Repl.) 120, *882*.

(8) *Anon.* (1553), 1 Dyer, 79a; 73 E.R. 169; 2 Digest (Repl.) 123, *913.*
(9) *Maleverer* v. *Spinke* (1537), 1 Dyer, 35 b; 73 E.R. 79; 2 Digest (Repl.) 103, *698.*
(10) *Mervyn* v. *Lyds* (1553), 1 Dyer, 90a; 73 E.R. 195; 2 Digest (Repl.) 121, *895.*
(11) *Herring* v. *Dean and Chapter of St. Paul's* (1819), 3 Swan. 492; 2 Wils. Ch. 1; 36 E.R. 949; 2 Digest (Repl.) 122, *905.*
(12) *Anon.* (1494), Y.B. 10 Hen. 7, fo. 2, pl. 3; 2 Digest (Repl.) 133, *1000.*
(13) *Herlakenden's Case* (1589), 4 Co. Rep. 62a; 76 E.R. 1025; 2 Digest (Repl.) 99, *652.*
(14) *Frankley* v. *Heyning* (1376), Y.B. 50 Edw. 3, fo. 10, pl. 21.
(15) *Anon.* (1549), Moore, K.B. 9; 72 E.R. 403; 2 Digest (Repl.) 100, *661.*
(16) *Waller and Petty* v. *Sands* (1632), Cro. Car. 274; 79 E.R. 839; 2 Digest (Repl.) 109, *770.*
(17) *Berry* (*Bery*) v. *Heard* (*Herd*) (1622), Cro. Car. 242; W.Jo. 255; Palm. 327; 79 E.R. 812; 2 Digest (Repl.) 101, *673.*
(18) *Soby* v. *Molins* (1575), 2 Plowd. 468a.
(19) *Anon.* (1594), 1 Gwill. 165.
(20) *Walton* v. *Tryon* (1751), Amb. 130; 1 Dick. 244; 2 Eag. & Y. 123; 2 Gwill. 827; 27 E.R. 85; 2 Digest (Repl.) 85, *486.*
(21) *Ram* v. *Patenson* (1596), Cro. Eliz. 477; sub nom. *Ranne* v. *Patison*, Moore, K.B. 908; 72 E.R. 988; 2 Digest (Repl.) 86, *510.*
(22) *Reynold's Case* (1604), Moore, K.B. 762.
(23) *Broke* v. *Rogers* (1605) Moore, K.B. 908.
(24) *Dr. Newman's Case* (1611), Godb. 175.
(25) *Greenaway* v. *Earl of Kent* (1722), Bunb. 98.
(26) *Anon.* (1587), Cro. Eliz. 55; 78 E.R. 316; 2 Digest (Repl.) 86, *509.*
(27) *Barrington's Case* (1611), 8 Co. Rep. 136b; 77 E.R. 681; sub nom. *Cholke* (*Chalke*) v. *Peters* (1610), 2 Brownl. 289, 322; Godb. 167; affirmed in error sub nom. *Barrington* v. —— (1615), 1 Roll. Rep. 137; 2 Digest (Repl.) 120, *883.*
(28) *Wystow's Case* (1523), Y.B. 14 Hen. 8, fo. 25, pl. 6; sub nom. *Wistow's Case*, cited in 11 Co. Rep. at p. 50 b; 77 E.R. 1215; 31 Digest (Repl.) 203, *3343.*
(29) *Swayne's Case* (1608), 8 Co. Rep. 63a; 77 E.R. 568; sub nom. *Swaine* v. *Becket*, Moore, K.B. 811; 1 Brownl. 231; 2 Digest (Repl.) 94, *583.*
(30) *Lady Russell* v. *Gulwell* (1599), Cro. Eliz. 657; Moore, K.B. 553; 78 E.R. 896; 31 Digest (Repl.) 29, *1867.*
(31) *Dive* v. *Maningham* (1550), 1 Plowd. 60; 75 E.R. 96.
(32) *Earl of Pembroke* v. *Syms* (*Simons*) (1600), Cro. Eliz. 781; 2 Co. Rep. 71b; 11 Co. Rep. 51 a; 78 E.R. 1012; 2 Digest (Repl.) 121, *899.*
(33) *Basset* v. *Manxel* (circa 1564), 2 Plowd. 1 (Appendix to reports).

Action for trespass for breaking and entering certain closes.

The defendant pleaded a lease by John Liford of the said tenements to the plaintiff, Thomas Stamp, and one Mary Parker for their lives and the life of the survivor, excepting the timber trees, etc., not being dotards, and then averred that the plaintiff and Mary Parker entered under the lease and afterwards the lessor covenanted to stand seised of the said tenements to the use of his son Richard in tail. Acting on Richard's orders the defendant entered on the premises, took certain trees, and sold them to persons named William and Henry Lawrence.

SIR EDWARD COKE, C.J., in his report, stated that on this plea of the defendant the plaintiff demurred in law. This case, he continued, was divided into two general questions: (i) what thing was excepted by the exception of the trees; and (ii) what thing passed by the conveyance of the reversion.

That the trees should not pass to Richard Liford [the son of the lessor], four objections were made: (i) that by the exception the trees remain as chattels in the lessor; (ii) admitting that by the exception the trees remain in him as an

A inheritance, then by the exception the soil itself is excepted to the lessor; (iii) that a freehold or inheritance in possession cannot be by the rules of the law parcel of the reversion expectant upon the freehold; (iv) that by the said covenant, John Liford convenanted to stand seised de tenem centa predicta cum pertinentibus superius dimissis, and, therefore, Richard Liford could not have more than were demised, and the trees were not demised.

B As to the first, they conceived that by the exception the trees were chattels in the lessor divided in law from the freehold and inheritance of the land, for when a man demises land for life, the property of the trees is in the lessee, and the lessor has but a possibility to have them again, scilicet, if they remain annexed to his inheritance when the lessee for life dies, and, therefore, it is resolved by the whole court in the *Abbot of Tore's Case* (1), in Y.B. 21 Hen. 6, fo. 46, pl. 23,

C that, if a man makes a lease for life of his land, he cannot give the trees to a stranger, because he has but a possibility, and by consequence when he excepts them to himself, they remain in him as chattels, and it is held in Y.B. 12 Edw. 4, fo. 8, pl. 20 [*Anon.* (2)] that, if a man makes a lease for years and the lessee Fells the trees, the lessor cannot take them: vide Y.B. 13 Hen. 7, fo. 9, pl. 4 [*Anon.* (3)]; Y.B. 21 Edw. 52, and if the lessor fells the trees, the lessee shall

D have them as it is held in Y.B. 44 Edw. 3, fo. 44, pl. 58 [*Anon.* (4)]. Which books and many others prove that the property of the trees is in the lessee for years, a fortiori in the lessee for life, and, therefore, when the lessor excepts them, he shall have them as chattels severed from the land. They relied much upon 2 Dyer, 184 (*Dauntsey* v. *Southwell* (5)), where question is made when trees are excepted in case of lessee for years, whether they should be chattels in the

E lessor, of which they would never have made a doubt in case of lessee for life, for the law makes a great difference between an exception in case of a lease for years and in the case of a lease for life. Therefore, if a man makes a lease for life of a manor, excepting one acre, this acre, during the lease, is not parcel of the manor, for in such case, in a real action brought of the manor, exception ought to be made; otherwise it is in case of a lease for years, as appears [in] Y.B. 38

F Hen. 6, 38 a.; 1 Plowd. at p. 103 b, in *Fulmerston* v. *Steward* (6). So, if the King makes a lease for life of a manor without speaking of the advowson, the advowson remains in the King as in gross, quod omnes concesserunt, as appears in Y.B. 38 Hen. 6, 34 b. There it is adjudged that by grant of the reversion, habendum the reversion with the advowson, the advowson shall not pass to the patentee, for the advowson in such case was severed and became in gross as to the fee, which

G it was said has great affinity with the case at Bar.

On the second question, admitting that the trees are reserved as an inheritance in the lessor, then the land itself, upon which the trees grow is thereby excepted, as it is resolved in *Ives's Case* (7) in 5 Co. Rep., fo. 11 a.: vide Y.B. 44 Edw. 3, 22; Y.B. 46 Edw. 3, 22 b.; 27 Lib. Ass. 49; Y.B. 3 Hen. 6, 45; Y.B. 16 Edw. 4, 2 a.; Y.B. 14 Hen. 8, 1 a., b.; 33 Hen. 8, Br. Reservation 39; 1 Dyer, 79a [*Anon.* (8)],

H and then it cannot pass by the conveyance of the reversion, for it was not any part of the demise. Therefore, if a man makes a lease for life of a manor excepting one acre, and afterwards grants the reversion of the manor to another in fee, the acre in possession shall not pass, but is severed from the manor for ever, as if A. is disseised of an acre, parcel of his manor, although the acre in right is parcel of the manor, yet, if A. enfeoffs another of his manor, the right of that acre

I shall not pass, but is severed from the manor for ever, as it is held in Y.B. 38 Hen. 6, 38 a. So, if a man is disseised of a common appendant, notwithstanding the disseisin, it in right is appendant to the manor, and yet, if, during the time of the disseisin, a feoffment in fee is made of the manor, the common is severed and extinct for ever, as it is held in Y.B. 4 Edw. 3, 46 a. and Fitzherbert's Natura Brevium 180 f. So in the case at Bar by the exception of the trees, the soil itself is excepted, wherefore it cannot pass by the grant of the reversion.

Thirdly, it was objected that a reversion expectant upon a freehold may be parcel or appendant to a freehold and inheritance in possession, but a freehold or

inheritance in possession cannot be parcel or appendant to a reversion expectant upon a freehold, as it is held in Y.B. 38 Hen. 6, 38 A.

On the fourth objection, the conveyance of the reversion does not touch the trees and the soil under them, for the conveyance recites the demise of the land with the exception of the trees, and conveys tenementa prædicta cum pertinentibus superius dimissis. The exception is not any parcel of the demise, as it is agreed in Y.B. 3 Hen. 6, 45 A., and, therefore, the conveyance does not extend to the trees excepted, and by consequence they cannot pass with the reversion. For these reasons the plaintiff ought to recover.

On the other side it was argued by the defendant's counsel, and unanimously agreed by the whole court, that the plaintiff should be barred. As to the first objection, it was answered and resolved that the trees, notwithstanding the exception, remain parcel and grow out of the inheritance of the land, and are not chattels, nor should go to his executors, but should descend to his heir, if no conveyance had been made of the reversion; and that for divers reasons. The first reason was that the law does not favour fractions and severances of trees from the freehold and inheritance of the land, because the trees would be thereby often wasted and destroyed, and, therefore, if a man by deed indented bargains and sells, gives and grants his manor of D. and all his trees growing thereon to another, and the deed is not enrolled according to the statute, forasmuch as the manor will not pass, the trees shall not pass to the bargainee, and so to be severed from the manor, although they are granted by express words, and the grant of everyone shall be taken most strong against himself, as it was resolved in 1567 and so was it held in 1573 in *Andrew's Case* in the Common Pleas, which I myself heard. In 1581 in 3 Dyer 374, pl. 18, a man

> "demiseth, granteth, and to farm letteth a farm, etc., together with all manner of timber, wood, underwood, and hedge-rows, thereunto appertaining (except all great oaks growing in one certain close about the farm-house"

to have and to hold the farm for the term of 21 years, rendering rent, and the doubt was whether the lessee might Fell and sell the timber trees not excepted without being impeached for the waste. Sir James Dyer conceived that he might by this word "grant," and by the meaning of the exception of great oaks, etc. Also the habendum which conveys the limitation for years does not mention timber, etc. But Periam, Windham, and Mead, JJ., gave judgment against the defendant, that he could not fell the timber, for it was not severed from the inheritance, nor passed by the grant.*

The second reason was that when a man demises his land for life or years, the lessee has but a particular interest in the trees, but the general interest of the trees remains in the lessor, for the lessee shall have the mast and fruit of the trees and shadow for his cattle, etc., but the interest of the body of the trees is in the lessor as parcel of his inheritance; and this appears in 1537 in 1 Dyer 36, pl. 32 [*Maleverer* v. *Spinke* (9)] where it is held in express words that it cannot be denied that the property of great trees, scilicet, the timber, is reserved by the law to the lessor, but he cannot grant it without the termor's licence, for the termor has an interest in it, scilicet, to have the mast and fruit growing upon it and the loppings thereof for fuel, but the very property of the tree is in the lessor as annexed to his inheritance, and all this (word for word) appears in the said book; and in *Mervyn* v. *Lyds* (10) (1 Dyer, at p. 90 b, pl. 8) it is also held that the lessee shall have the fruit of the trees, and the branches for fuel and inclosure of fences. In Y.B. 10 Hen. 7, fo. 2, pl. 3 A. [*Anon.* (12)] the lessee has no interest in the trees, but to lop them, or for shadow for his cattle, so that there it is said that the lessee has interest in the tree, and the lessor also: vide *Herlakenden's Case* (13), in 4 Co. Rep. 62 a. On consideration of these and many other books, it was

* A chapter not being entitled to fell timber on the deanery lands, except for the purpose of repairs, a lease granted by them of certain "woods, groves, hedgerows, and springs," was construed not to include the right of felling timber: *Herring* v. *Dean and Chapter of St. Paul's* (11).

A resolved that when no exception is in the lease of the trees, the lessee has such particular interest in the tree as is aforesaid, and the inheritance of the trees is in the lessor. By this difference all our books are well reconciled, which difference also appears in the books themselves, for in waste against lessee for life or years in case of felling of trees, it is said in the writ to be ad exhæredationem of the lessor, and the lessor, after he has made a lease for life, may by deed grant the B trees or reasonable estovers out of them to another and his heirs, and it shall take effect after the death of the lessee, and such grant by the lessor is good in respect of the inheritance which he has in such case in the trees, and the lessor may by word command (license) the lessee to fell the trees, as it is held in Y.B. 18 Edw. 3, 54 and Y.B. 2 Hen. 7, 14 b. But what is said in Y.B. 21 Hen. 6, fo. 46, pl. 23, is true, that such gift to a stranger is void during the estate for life, for the C particular prejudice that may accrue to him who has the estate for life*: and in Y.B. 50 Edw. 3, fo. 10, pl. 21, in *Frankley's Case* (14) it is said that at the common law it was never seen that any tithes should be paid of great trees, because they are parcel of the inheritance, and it is provided by the statute of 45 Edw. 3, c. 3 [repealed S.L.R., 1948], that in such case a prohibition lies, as before has been used, which proves that the common law was so before making of the D statute.† So it was held in 1600, in *Sampson* v. *Worthington* in the Common Pleas, that if timber trees have been usually topped and lopped, no tithes shall be paid of them, for as the law privileges the body of the tree, being parcel of the inheritance, so it privileges the branches also, and therewith agrees Doctor and Student.‡ So, if a man fells his timber trees, tithes shall not be paid for the germins which are growing ex radicibus seu stipitibus, in respect that the root E is parcel of the inheritance, as it was held in 1587 in this court [*Anon.* (26)]. So, if a timber tree becomes arida, sicca, et non portans folia nec fructus in æstate, nec existens maeremium, and the owner fells it, no tithes shall be paid thereof for the inheritance which was once in him, which privilege extends to it when it becomes dotard, as it was adjudged in 1605 in *Brook* v. *Rogers* [see *Broke* v. *Rogers* (23)]. So for the bark of oaken timber, no tithes shall be paid, for the reason aforesaid, and therewith F agrees Doctor and Student 175. But for acorns tithes shall be paid, because they grow yearly, as appears in the Register, fol. 49. A man may have an inheritance in fee simple in lands, as long as such a tree shall grow, Y.B. 27 Hen. 8, fo. 29, pl. 20, because a man may have an inheritance in the tree itself: vide Y.B. 46 Edw. 3, 1 b. in Trespass; Y.B. 32 Hen. 6, 2; Y.B. 20 Hen. 6, 22 b.; Y.B. 5 Hen. 4, 2. It is enacted by the Statute of Westminster 2, c. 22 [actions of waste; repealed by Civil Pro- G cedure Acts Repeal Act, 1879], cum duo vel [plures] teneant boscum, etc., that, if one tenant in common in fee simple commits waste in the trees, the other shall have an action of waste, and the writ shall say ad exhæredationem, as in Y.B. 29 Edw. 3, fo. 19, if one coparcener before partition makes a feoffment to another, and one of them commits waste in the trees, an action of waste lies, and that was provided for the preservation of the trees: Fitzherbert's Natura Bre- H vium 49 (I).

If a parson of a church and one A. are tenants in common of a wood, and A. endeavours to commit waste, the parson, for the preservation of the timber trees, shall have a prohibition against him that he shall not commit waste, and the

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* Contra, *Herlakenden's Case* (13), Co. Rep., Vol. 2, p. 445 quod vide and note (B) ib. In *Anon.* (15) it is said generally that the lessor cannot sell the trees during the term. And in
1 *Waller and Petty* v. *Sands* (16) the same point was moved: but the case was adjourned. In *Berry* v. *Herd* (17) (Palm. 328) Doderidge, J., says generally: "The lessor cannot grant the trees to a stranger, because the stranger cannot take them, by reason of the special property which the lessee has:" and see *Mervyn* v. *Lyds* (10) (Dyer, 90b). Such a grant, it is clear, could not take effect during the existence of the lease: but there seems to be no valid objection to its taking effect after the determination of it. The grant must be by deed; and the deed, though inoperative against the lessee would operate as an estoppel against the grantor.

† According to argument in *Soby* v. *Molins* (18) (Plowd. 470b.); 2 Inst. 642.

‡ According to *Anon.* (19), *Walton* v. *Tryon* (20) (2 Gwill. 832); *Soby* v. *Molins* (18) (Plowd. 470b.); Rolle's Ab., Dismes 2; *Ram* v. *Patenson* (21); *Reynold's Case* (22); *Broke* v. *Rogers* (23); *Dr. Newman's Case* (24). Contra, *Greenaway* v. *Earl of Kent* (25).

reason thereof, as the Chief Justice said, was that, if the parson of a church will waste the inheritance of his church to his private use in felling trees, the patron may have a prohibition against him, for the parson is seised as in the right of his church, and his glebe is the dower of his church, for of it he was endowed, and so speaks many ancient records. So, forasmuch as a prohibition lies against them, reason requires that he should have the like remedy against him who holds in common with him, and thereupon a notable resolution in the Parliament held at Carlisle (see RYLEY'S PLACITA PARLIAMENTIA, 335) in 1307 was cited to this effect, for there upon complaint made (in these words): "Will our lord the King understand that Sir Anthony, Bishop of Durham, wastes and destroys all the wood appertaining to his church in the bishopric of Durham, by giving, and selling, and ill-keeping, and by erecting forges of iron and lead, and burning of coals, etc., wherefore if our lord the King, who is patron of the church, puts not remedy thereto, the church aforesaid will be disinherited and impoverished, in prejudice of our lord the King in his crown, and of the chapter of Durham: 'Ita responsum est: inhibeatur per breve de Cancellar' Episcopo et ministr' suis ne faciant vastum de content' in petiti' ". By which it appears that the Parliament referred it to the ordinary remedy of the common law by writ of prohibition in such case. If a bishop or archdeacon abates or fells all the wood that he has, as bishop, he shall be deposed as a dilapidator of his house, Y.B. 29 Edw. 3, 16 A., acc' vide 27 LIB. ASS., pl. 10; Y.B. 20 Hen. 6, 46 A.; Y.B. 10 Edw. 4, 19; and the treatise intituled [i.e., Statute 35 Edw. 1, Stat. 2: Ruff]: "Ne rectore prosternat arbores in cœmeterio," which is but a declaration of the common law, in these words: "prohibemus ne ecclesiarum rectores arbores in cœmiterio crescentem presumant prosternere indiscrete, nisi cum cancellus ecclesiæ necessaria indigeat refectione, etc." It is regularly true. Meliorem conditionem ecclesiæ facere potest prælatus, deterioem nequaquam.

As to the second objection, a difference was taken between a wood which may be demanded in a præcipe by the name of so many acres of wood, and trees growing out of any wood which cannot be demanded in a præcipe by any name, but by the name of land or pasture, etc., where they grow, for if such a wood whereof a præcipe lies is parcel of my manor of G., and I lease my manor, excepting woods, thereby the soil itself is excepted, and in a præcipe brought of the manor an exception ought to be made of so many acres of wood, but in such case, if I except all my trees which grow out of any wood, but upon land or pasture, there, by the exception of the trees, the soil itself is not excepted, but sufficient nutriment out of the land is reserved to sustain the vegetative life of the trees, for without that, the trees, which are excepted, cannot subsist, but if the lessor fells them, or by the lessee's licence grubs them up, in such case the lessee shall have the soil for cessante causa cessat effectus. This difference may be collected out of *Ive's Case* (7), in 5 Co. Rep. 11 a.: vide Y.B. 14 Hen. 8, 1 A. B. If I by deed grant all my trees within my manor of G. to one and his heirs, the grantee shall have an inheritance in them, without any livery and seisin: vide *Barrington's Case* (27), in 8 Co. Rep. 136 b. And in a præcipe brought against lessee for life, where the trees are excepted, you need not in such case except the trees, because no præcipe lies of them, but they shall be recovered by him who has right paramount by the recovery of the land: vide for the said rule of exception, Y.B. 4 Edw. 3, 48; Y.B. 17 Edw. 3, 62; Y.B. 10 Hen. 7, 17; FITZHERBERT'S NATURA BREVIUM 201; etc. By this difference, apparent in our books, they all are well reconciled. In the said exception five things were observed: (i) That notwithstanding the exception, they remain as parcel of the inheritance. (ii) That the soil itself was not excepted, but sufficient nutriment for the growth of the tree. (iii) That the lessee shall have the pasture under the tree, as in 4 Edw. 6, tit. Waste, BR. 136. Nothing shall be recovered in waste but the circuit of the root, and not the latitude of the branches. (iv) That the lessor shall have all the benefits of the trees, and (v) the young of all birds that breed in the trees and the fruits.

It was resolved that, although fictione juris quoad the lessee, the tree is divided

A from the freehold, yet in facto and truth, as to all others, it is parcel of the lessor's inheritance, for it was said that timber trees cannot be felled with a goose quill, as if the tenant in tail sells the trees to another, now they are a chattel in the vendee, and his executors shall have them, and in such case fictione juris they are severed from the land, but if the tenant in tail dies before actual severance, as to the issue in tail, they are parcel of his inheritance and shall go with it, and
B the vendee cannot take them, and yet quoad the tenant in tail himself, they were severed for a time: Y.B. 18 Edw. 4, 6 a.; Y.B. 11 Hen. 4, 32 b.; Plowd 25 a. [sic., but see 259 a.] and 2 Plowd. 437; Y.B. 27 Hen. 8, 5 b. So in the case at Bar quoad the lessee, fictione juris, they are divided for a time, but quoad the lessor and all others they remain parcel of the inheritance.

It was also resolved that there is a difference between the cases which have been
C put, and the case at Bar, for it is true, if a man makes a lease for life of a manor to which an advowson is appendant, and excepts one acre with the advowson, in such case, if he grants over the reversion, the acre with the advowson shall not pass to the grantee, but they are severed and disunited from the manor for ever, as an arm or other member, divided from the body, but the trees, notwithstanding the exception, are growing out of the land, and have their nutriment from it, and are
D not in rei veritate divided from it. Therefore, if a man makes a feoffment in fee of a manor excepting the trees, and afterwards the feoffee buys the trees, they are again made parcel of the inheritance, although they were absolutely divided for a time. That appears in *Herlakenden's Case* (13), in 4 Co. Rep. 63 b. But in the same case, if an acre or a house had been excepted, and the feoffee afterwards purchases the acre or the house, none of them shall be parcel of it again, and so the
E difference appears inter partem integralem, similarem, et dissimilarem, et inter partem dissimilarem solo annexam sive adhærentem (as it is said in Y.B. 9 Edw. 3, fo. 2, pl. 4, *Robert le Valor's Case*) ut domus et partem dissimilarem excrescentem ut arbor.

As to the third objection, it is true that an integral part, or thing appendant in possession, cannot be parcel, etc., of a reversion expectant upon an estate for
F life, as has been said, but the trees (as has been often said) are growing out of the inheritance, and attendant upon it, as by a grant of the reversion, the charters and evidences shall pass as things attendant upon the inheritance, and in truth they are the sinews of the inheritance. So if I have a manor in which there is a park and fish-ponds, and I lease the manor except the game of deer and the fish and afterwards I grant over the reversion, the grantee shall have the deer and the fish
G as things attendant upon the inheritance, so not only those which have vegetative life, but all those which have sensitive life, shall go with the inheritance. It is resolved in Y.B. 14 Hen. 8, fo. 25, pl. 6, in *Wystow's Case* (28) of Gray's Inn, that if a man has a horse-mill, and the miller takes the millstone out of the mill to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill, as if it had always been lying upon the
H other stone and by consequence by the lease or conveyance of the mill it shall pass with it, so of doors, windows, rings, etc. The same law of keys. Although they are distinct things, yet they shall pass with the house. A fortiori in the case at the Bar, the trees which are growing out of the inheritance shall pass with it. In the case at the Bar it would be a great inconvenience if the trees should not pass with the inheritance, for in all the leases for life or years made by the
I King, either of land within the survey of the Exchequer or of the Duchy, the trees are excepted, and if they should be reputed as chattels, or if they should not pass with the reversion as parcel of the inheritance, great inconvenience would ensue, although the trees are particularly granted: vide *Swayne's Case* (29), in 8 Co. Rep. 63 a, quod nota bene.

As to the fourth and last objection, it was resolved (i) that if the reversion had been conveyed over by the name of tenements or of his reversion generally, without question the trees would pass, and although he covenanted to stand seised de tenementa prædicta cum pertinentibus superius dimissis, etc., yet the inheritance

of the whole land passed, and by consequence the trees being parcel of the inheritance, shall pass with it, and the trees shall not pass as things demised, but as things annexed to the inheritance, notwithstanding that they are not demised. In the argument of this point the following cases were cited. *Lady Russell* v. *Gulwell* (30), in this court in 1599, which was an action of debt on a bond. In that case the plaintiff by deed indented leased to the defendant a farm called D. except one close by name, and the lessee by the same indenture covenanted with the lessor to do divers things concerning the premises, and was bound in the said bond to perform all the covenants and agreements in the said indenture; and the question was whether these words, "the premises," should extend to the close excepted. (And MOUNTAGUE, C.J., in *Dive* v. *Maningham* (31) (1 Plowd. at p. 67 a) held, that "the premises" should extend to the thing excepted.) But it was resolved that in the principal case præmissa should not extend to the thing excepted, but are as much in effect as prædimissa. And in a case in 1568 [cited in Hob. at p. 276] one by deed indented demised certain land between Pond-meadow, of the one part, and Todes-yard, of the other part, and the lessee covenanted to repair the hedges about the premises; and it was adjudged, that it should not extend to the abuttals, but præmissa should be taken in law as prædimissa. So in the case at Bar, tenementa prædicta, et tenementa prædicta superius dimissa, and præmissa, and prædimissa, or præconcessa, are all one in judgment of law.

But in 1594 [in *Earl of Pembroke* v. *Simons* (32)] in this court, between the Earl of Pembroke and Simons (servant of Sir Henry Barkley) the case was that the father of the plaintiff had granted to Sir Henry Barkley the keeping of Staffordale Walk, and of Brewcomb Walk, in the forest of Fromeselwood, for the term of his life. The plaintiff by his deed did confirm the estate of the said Sir Henry in Brewcomb Walk, and granted Staffordale Walk to him and the heirs males of his body, with a proviso that, if he felled any trees in the premises, then his estate should cease. Afterwards Sir Henry felled trees in Brewcomb Walk, and it was resolved that these words, "the premises," should extend to it, for the deed had operation in it by way of confirmation, and, therefore, there præmissa should be taken as well for præconfirmata as præconcessa, but should not extend to any other part of the forest, although it was not named before, of which the deed has no operation. The Chief Justice said that as to cutting down of trees, grass, corn, and other things annexed to the soil, there are great variances of opinions in our books, not only against whom the action of trespass vi et armis shall be brought for recovery of damages, but also concerning the property of them. Therefore, if one disseises me, and during the disseisin he cuts down the trees, or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him vi et armis, for the trees, grass, corn, etc., for after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me. But if my disseisor makes a feoffment in fee, gift in tail, lease for life or years, etc., and afterwards I re-enter, I shall not have trespass vi et armis against those who came in by title, for this fiction of the law that the freehold continued always in me shall not have relation to make him who comes in by title a wrongdoer vi et armis, for in fictione juris semper æquitas existit. But in such case I shall recover all the mean profits against my disseisor, in the same manner as the disseisee in such cases should recover in an assize at the common law before the Statute of Gloucester, c. 1, damages only against the desseisor. Also it is to be presumed that the feoffee has given consideration or recompense to the disseisor, and that the lessee has paid rent to him or other consideration, and, therefore, in reason the disseisor is to be charged with the whole. The same law, if my disseisor is disseised and afterwards I re-enter, I shall not have an action of trespass against the second disseisor, because the said fiction of law as to action extends only to my disseisor, and if I should punish the second disseisor, he would be twice charged, and, therefore, I shall recover all the mean profits against my disseisor, his servants, and others who have committed the trespass by his command and in his right; and so has the law been often taken upon consideration of

all the books in [Year Books] 9 Edw. 3, fo. 2, pl. 4 (*Robert le Valors Case*); 10 Hen. 6, 14; 19 Hen. 6, 27; 22 Hen. 6, 21; 32 Hen. 6, 32; 33 Hen. 6, 46; 34 Hen. 6, 30; 37 Hen. 6, 35; 38 Hen. 6, 28; 2 Edw. 4, 18; 9 Edw. 4, 39; 11 Edw. 4, 4; 20 Edw. 4, 18; 21 Edw. 4, 5, and 74; 22 Edw. 4, 21; 6 Hen. 7, 9; 10 Hen. 7, 27; 12 Hen. 7, 25; 13 Hen. 7, 15 b. All this is true quoad actionem: sed quoad proprietatem the regress of the disseisee re-vests the property in him, as well for the corn as for the grass and trees, etc., and as well against the feoffee, lessee, etc., and the second disseisor as against the disseisor himself, for the act of my disseisor may alter my action, but his act cannot take away my action, property, or right. In this also there is great variety of opinions in our books, for some, as to the disseisor himself, have taken a difference between things which come by the act and operation of the disseisor himself (as if he sows the land and afterwards reaps and carries the corn away, the disseisee after his re-entry cannot take it, for if he had not sowed the land, no corn had been there, and it is for the advancement of tillage that the land should not lie fresh) and things which come by the act of God, as grass, trees, etc. But upon consideration of all the books, it has been resolved and adjudged that it is all one, and there is no diversity between them, for the rule and reason of the law, as has been said, is that after the regress of the disseisee the law adjudges as to the disseisor himself that the freehold has continued in the disseisee, which rule and reason extends as well to corn, as to trees or grass, etc. The same law, if the feoffee, or lessee, or the second disseisor, sows the land, or cuts down trees or grass, and severs, and carries away, or sells them to another, yet after the regress of the disseisee, he may take as well the corn as the trees and grass, to what place soever they are carried, for the regress of the disseisee has relation as to the property, to continue the freehold against them all, in the disseissee ab initio, and the carrying them out of the land cannot alter the property, and if the disseisee takes them, they shall be recouped in damages against the disseisor. So has it been often resolved and put in experience upon consideration of the books in [Year Books] 27 Hen. 6, 1 a.; 37 Hen. 6, 7 b.; 12 Edw. 4, 5 a.; 14 Edw. 4, 6 b.; 15 Edw. 4, 31 a. b.; 2 Hen. 7, 1 b.; 3 Hen. 7, 1 and 6; 5 Hen. 7, 16; 12 Hen. 7, 25 a., and 1 Dyer 31 b., pl. 219; 2 Dyer 173 a., pl. 15.

Lastly, it was resolved by the whole court in the principal case that when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, power, as incident to the exception, to enter and shew the trees to those who would have them, for without sight none would buy, and without entry they could not see them. As in Y.B. 9 Hen. 6, 29 b., a man seised of a house in a borough, etc., devisable, devised it to a woman in tail, and if the woman died without issue, that his executor might sell and dispose of it for his soul. In that case the executor might, by the law, enter into the house to see if it was well repaired or not, to the intent to know at what value the reversion is to be sold, quod fuit concessum per totam curiam, 43 Lib. Ass., pl. 7. The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit in the land of another, to enter into the land to mend it, when occasion requires it, as is resolved in Y.B. 9 Edw. 4, 35 a. So it is agreed in 2 Rich. 2, Bar. 237. If I grant you my trees in my wood, you may come with carts over my land to carry the wood: temp. Edw. 1, Grants 41. Lex est cuicunque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit, and this is a maxim in law; vide Year Books 5 Edw. 3 Trans. 13; 20 Edw. 3, Avowry 124; 8 Ed. 4, 5; 12 Edw. 4, 10; 18 Edw. 4, 14 b.; 20 Hen. 6, 37; 21 Hen. 7, 14 b.; 14 Hen. 8; and 2 Plowd. in *Manxel's Case* (33), fol. 13 b [of Appendix]; vide in my reports, lib. 4, fol. 62 [*Herlakenden's Case* (13)], and lib. 5, fol. 11 [*Ive's Case* (7)].

As to the plea in bar, it was held that it was without form, and without knowledge of good pleading, and that for four reasons. (i) The defendant pleads a lease for life of the tenements to the plaintiff and one Mary Parker in which by force whereof they entered, and were, and yet are seised, etc., which is an averment

of the life of Mary Parker, which upon the matter is that the plaintiff has nothing in the tenements in which, etc., but jointly with M. Parker who is alive, not named in the writ, but concludes and demands judgment si actio, which is not well pleaded, for every plea ought to have an apt conclusion, and therewith agree Y.B. 40 Edw. 3, 9 b; Y.B. 43 Edw. 3, 27; Y.B. 36 Hen. 6, 18 a; vide 22 Lib. Ass., pl. 53; Y.B. 14 Hen. 4, 7; Y.B. 4 Hen. 6, 27; Y.B. 18 Hen. 6, 32; Y.B. 9 Hen. 7, 2. So if a man pleads an estoppel, he ought to rely upon it, and not demand judgment si actio. (ii) The plea contains double matter, one to the writ by joint-tenancy, the other in bar, by the exception and the covenant. (iii) In pleading of a lease for life which passes by livery and seisin, it is mere surplusage to plead an entry of the lessees. (iv) He does not aver that the trees which were sold were not dotards, which are excluded out of the exception, but he avers that they de jure pertinebant to Richard Liford, which is not formal, for he ought in good pleading to have averred that they were not dotards. But upon the whole matter, sufficient appears to the court to give judgment against the plaintiff, wherefore, by the rule of the court, the plaintiff took nothing by his bill.

Judgment for defendant.

RYALL AND OTHERS *v.* ROLLE AND OTHERS

[Lord Chancellor's Court (Lord Hardwicke, L.C., Sir William Lee, C.J. (K.B.), Sir Thomas Parker, C.B., and Burnet, J. (C.P.)), February 24, 1748, January 27, 1749]

[Reported 1 Atk. 165; 1 Wils. 260; 1 Ves. Sen. 348; 9 Bli.N.S. 377; 26 E.R. 107]

Bankruptcy—Property available for distribution—Property in reputed possession of bankrupt—Acquirement of false credit.

The provision in bankruptcy law [see now Bankruptcy Act, 1914, s. 38 (c)] that the property of a bankrupt divisible among his creditors shall include all goods which at the commencement of the bankruptcy were in the possession of the bankrupt in his trade or business by the consent of the true owner under such circumstances that he is the reputed owner thereof is directed against the possibility of the bankrupt acquiring a false appearance from the visible possession of the property and obtaining credit to which he is not entitled to the detriment of the creditor.

Mortgage—Distinguished from pledge or pawn—Need for delivery to mortagagee or pawnee—Title of mortgagee and pawnee.

A mortgage of a chattel is distinguishable from a pledge or pawn inasmuch as a mortgage is an immediate conveyance of the chattel to the mortgagee to whom it gives a legal property subject to the right of the mortgagor to redeem and the chattel need not be delivered into the possession of the mortgagee, whereas in the case of a pawn or pledge the property pledged must be delivered to the pawnee who acquires a special property in the article pledged, the general property remaining in the pawnor.

Partnership—Property of partnership—Subject to debt from one partner to another.

Partnership property is no further subject to debts from one partner to another than as the money has been to the partnership trade.

Notes. Considered: *West* v. *Skip* (1749), 1 Ves. Sen. 239. Applied: *Falkener*

v. *Case* (1781), 1 Bro.C.C. 125. Distinguished: *Atkinson* v. *Maling* (1788), 2 Term Rep. 462. Considered: *Lingham* v. *Biggs* (1797), 1 Bos. & P. 82. Applied: *Dearle* v. *Hall*, [1824–34] All E.R.Rep. 28. Distinguished: *Reeves* v. *Capper*, [1835–42] All E.R.Rep. 164. Applied: Belcher v. Bellamy (1848), 2 Exch. 303; *Donald* v. *Suckling* (1866), L.R. 1 Q.B. 585. Considered: *Re Bainbridge*, *Ex parte Fletcher* (1878), 8 Ch.D. 218. Referred to: *Doddington* v. *Hallet* (1750), 1 Ves. Sen. 497; *Ward* v. *Turner* (1752), 2 Ves. Sen. 431; *Ex parte Shark* (1754), 1 Atk. 234; *Ex parte Dumas* (1754), 2 Ves. Sen. 582; *Worseley* v. *Demattos and Slader* (1758), 1 Burr. 467; *Mason* v. *Vere* (1779), 2 Wm. Bl. 1309; *Plumb* v. *Fluitt* (1791), 2 Anst. 432; *Jones* v. *Gibbons* (1804), 9 Ves. 407; *Horn* v. *Baker* (1808), 9 East, 215; *Taylor* v. *Plumer*, [1814–23] All E.R.Rep. 167; *Re Frazer*, *Ex parte Monro* (1819), Buck, 300; *Hartley* v. *Smith* (1819), Buck, 368; *Hubbard* v. *Bagshaw* (1831), 4 Sim. 326; *Re Severn*, *Ex parte Colville* (1831), 9 L.J.O.S.Ch. 56; *Ex parte Reynal* (1841), 2 Mont. D. & De G. 443; *Belcher* v. *Capper* (1842), 4 Man. & G. 502; *Bartlett* v. *Bartlett* (1857), 1 De G. & J. 127; *Re Buller*, *Ex parte Wornald* (1860), 2 L.T. 544; *North* v. *Gurney* (1861), 1 John & H. 509; *Grainge* v. *Warren*, *Re Grainge* (1865), 6 New Rep. 219; *Cooke* v. *Hemming* (1868), L.R. 3 C.P. 334; *Re Hallett's Estate*, *Knatchbull* v. *Hallett*, *Cotterell* v. *Hallett*, [1874–80] All E.R.Rep. 793. *Colonial Bank* v. *Whinney*, [1886–90] All E.R.Rep. 468; *Re Richards*, *Humber* v. *Richards* (1890), 45 Ch.D. 589; *Ward* v. *Duncombe*, [1893] A.C. 369; *Ernest Augustus of Hanover* (*H.R.H. Prince*) v. *A.-G.* [1955] 3 All E.R. 647.

As to property in reputed ownership of bankrupt, distinction of mortgage from pledge or pawn, and loans between partners, see 2 Halsbury's Laws (3rd Edn.) 438; ibid., vol. 27, p. 162; ibid, vol. 28, pp. 542, 543. For cases see 5 Digest (Repl.) 808 et seq., 35 Digest (Repl.) 286, 287; 36 Digest (Repl.) 552. For the Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Ross* v. *Bromstead* (1624), Benl. 144; 73 E.R. 999; sub nom. *Rosse* v. *Bramsteed*, 2 Roll. Rep. 438; 81 E.R. 902; 29 Digest (Repl.) 25, *282*.

(2) *Clark's Case* (1589), 2 Leon. 30, 89; 74 E.R. 333, 382; 37 Digest (Repl.) 181, *109*.

(3) *Brand* v. *Lisley* (1609), Yelv. 164; 80 E.R. 109; 12 Digest (Repl.) 218, *1585*.

(4) *Mores* v. *Conham* (1610), Owen, 123; 74 E.R. 946; 37 Digest (Repl.) 13, *97*.

(5) *Coggs* v. *Bernard* (1703), ante p. 1; 2 Ld. Raym. 909; 3 Salk. 268; Holt, K.B. 528; 1 Com. 133; 92 E.R. 107; sub nom. *Anon.*, Holt, K.B. 569; 2 Salk. 522; 37 Digest (Repl.) 2, *1*.

(6) *Ratcliffe* v. *Davis* (1610), 1 Bulst. 29; Cro. Jac. 244; Yelv. 178; Noy, 137; 80 E.R. 733; 37 Digest (Repl.) 12, *75*.

(7) *Twyne's Case* (1602), 3 Co. Rep. 80 b; 76 E.R. 809; sub nom. *Chamberlain* v. *Twyne*, Moore, K.B. 638; 25 Digest (Repl.) 185, *109*.

(8) *Stone* v. *Grubham* (1615), 1 Roll. Rep. 3; 2 Bulst. 225; 81 E.R. 285; 25 Digest (Repl.) 218, *348*.

(9) *Head* v. *Egerton* (1734), 3 P.Wms. 280; 24 E.R. 1065, L.C.; 35 Digest (Repl.) 545, *2236*.

(10) *Peter* v. *Russell* (1716), Gilb. Ch. 122; 2 Vern. 726; 25 E.R. 85, L.C.; 35 Digest (Repl.) 543, *2224*.

(11) *Tourle* v. *Rand* (1789), 2 Bro.C.C. 650; 29 E.R. 360, L.C.; 35 Digest (Repl.) 546, *2245*.

(12) *Bucknal* v. *Roiston* (1709), Prec. Ch. 285; 24 E.R. 136; sub nom. *Anon.*, 2 Eq. Cas. Abr. 479, L.C.; 25 Digest (Repl.) 218, *354*.

(13) *Meggot* v. *Mills* (1697), 1 Ld. Raym. 286; 12 Mod. Rep. 159; 91 E.R. 1088; 25 Digest (Repl.) 218, *353*.

(14) *Waller* v. *Hanger* (1615), 3 Bulst. 1.

(15) *Langford* v. *Tyler* (1704), 6 Mod. Rep. 162; 87 E.R. 919; sub nom. *Langfort* v. *Tiler*, 1 Salk. 113; 27 Digest (Repl.) 176, *1300*.

(16) *Core's Case* (1536), 1 Dyer, 20 a; 73 E.R. 42.
(17) *Stephens* v. *Sole* (1736), 1 Ves. Sen. at p. 352; 1 Atk. at pp. 157, 170; 27 E.R. 1077; 5 Digest (Repl.) 808, *6837*.
(18) *Bourne* v. *Dodson* (1740), 1 Atk. 154; Barn. Ch. 200; 26 E.R. 100, L.C.; 5 Digest (Repl.) 820, *6923*.
(19) *Brown* v. *Heathcote* (1746), 1 Atk. 160; 26 E.R. 103; 5 Digest (Repl.) 820, *6924*.
(20) *Poole's Case* (1703), 1 Salk. 368; Holt, K.B. 65; 91 E.R. 320; 31 Digest (Repl.) 226, *3624*.
(21) *Spencer's Case* (1583), ante p. 69; 5 Co. Rep. 16 a.; 77 E.R. 72; 31 Digest (Repl.) 153, *2907*.
(22) *Read* v. *Lawnse* (1561), 2 Dyer, 212 b; 1 And. 4; 73 E.R. 469; 31 Digest (Repl.) 245, *3804*.
(23) *West* v. *Skip* (1749), 1 Ves. Sen. 239; 27 E.R. 1006, L.C.; 36 Digest (Repl.) 554, *1138*.
(24) *Ford and Sheldon's Case* (1606), 12 Co. Rep. 1; 77 E.R. 1283, Ex. Ch.; 11 Digest (Repl.) 652, *752*.
(25) *Small* v. *Oudley* (1727), 2 P.Wms. 427.
(26) *Whitecomb* v. *Jacob* (1710), 1 Salk. 160; 91 E.R. 149; 1 Digest (Repl.) 653, *2265*.
(27) *Scott* v. *Surman* (1742), Willes, 400; 125 E.R. 1235; 1 Digest (Repl.) 653, *2266*.
(28) *Earl of Craven* v. *Knight* (1683), 2 Rep. Ch. 226; 21 E.R. 664; 4 Digest (Repl.) 458, *4001*.
(29) *Richardson* v. *Gooding* (1693), 2 Vern. 293.
(30) *Ex parte Crowder* (1715), 2 Vern. 706; 23 E.R. 1064; 4 Digest (Repl.) 459, *4014*.
(31) *Croft* v. *Pyke* (1733), 3 P.Wms. 180; 24 E.R. 1020, L.C.; 36 Digest (Repl.) 541, *1015*.
(32) *Barker* v. *Redding* (*Reading*) (1627), Palm. 485; W.Jo. 163; 81 E.R. 1183; 44 Digest (Repl.) 239, *616*.
(33) *L'Apostre* v. *Le Plaistrier* (1708), cited in 1 P.Wms. at p. 318; 24 E.R. 406; 44 Digest (Repl.) 239, *617*.
(34) *Godfrey* v. *Furzo* (1733), 3 P.Wms. 185; 24 E.R. 1022, L.C.; 5 Digest (Repl.) 754, *6484*.
(35) *Ex parte Marsh* (1744), 1 Atk. 158; 26 E.R. 102, L.C.; 12 Digest (Repl.) 248, *1915*.
(36) *Copeman* v. *Gallant* (1716), 1 P.Wms. 314; 24 E.R. 404, L.C.; 44 Digest (Repl.) 239, *618*.
(37) *Stukeley* v. *Butler* (1615), Hob. 168; 80 E.R. 316; sub nom. *Stewkley* v. *Butler*, Moore, K.B. 880; 72 E.R. 970; 2 Digest (Repl.) 119, *875*.
(38) *Tiffard* v. *Warcup* (1677), 2 Mod. Rep. 279.
(39) *Bachkurst* v. *Climkard* (1690), Holt, K.B. 643; 90 E.R. 1255; sub nom. *Bachurst* v. *Clinkard*, 1 Show. 174; 21 Digest (Repl.) 597, *856*.
(40) *Heydon* v. *Heydon* (1694), 1 Salk. 392.
(41) *Cole* v. *Davies* (1698), 1 Ld. Raym. 724; 91 E.R. 1383; 21 Digest (Repl.) 564, *605*.
(42) *Slade's Case* (1602), 46 Rep. 91 a; 76 E.R. 1072; sub nom. *Slade* v. *Morley*, Moore, K.B. 433; Yelv. 21; sub nom. *Morgan* v. *Slade*, Moore, K.B. 667; 24 Digest (Repl.) 670, *6589*.
(43) *Clayton's Case* (1628), Litt. 86; 124 E.R. 150.
(44) *Calye's Case* (1584), 8 Co. Rep. 32 a; 77 E.R. 520; sub nom. *Windham and Mead's Case*, 4 Leon. 96; 29 Digest (Repl.) 2, *1*.
(45) *Blackborough* v. *Davies* (1701), 1 Ld. Raym. 684; 1 Com. 96, 108; Holt, K.B. 43; 1 P.Wms. 41; 1 Salk. 38, 251; 12 Mod. Rep. 615; 91 E.R. 1355; 23 Digest (Repl.) 247, *3009*.

A **Proceedings in the bankruptcy** of William Harvest.

Sir William Murray and *Noel* for the plaintiffs, assignees under the commission.
Sir Dudley Ryder and *Wilbraham* for the defendants, the mortgagees.

BURNET, J.—William Harvest, a trader within the Bankrupt Acts, being
B indebted to Benjamin and Joseph Tomkins, did, by indenture of June 2, 1732, demise his house, brewhouse, outhouses, coppers, and utensils fixed or belonging to the brewhouse, for a term of 500 years, redeemable on payment of £1,500 and interest. On October 15, 1736, Harvest entered into partnership with Jonathan Stephens, deceased, to whom Rolle the defendant was executor. The utensils and stock in trade were appraised at £14,000 and Harvest conveyed one moiety thereof
C to Stephens. They carried on the trade jointly until June 26, 1740, when Harvest became a bankrupt. On Dec. 24, 1736, Harvest, in consideration of £4,000 did, by way of securing the same, assign over his moiety of the utensils and stock in trade to one Potter in trust for Stephens, and there was a clause in that mortgage to secure any sums that should be afterwards lent. Sir Thomas Reynell, having entered into two bonds as a surety for Harvest, he on Dec. 10, 1737, in considera-
D tion of £1,000, assigned one-seventh of his moiety of the partnership stock, etc., to Sir Thomas Reynell, with a defeasance to be void upon his indemnifying him against the bonds. The house and brewhouse, with the outhouses, had been mortgaged to Benjamin and Joseph Tomkins's in 1725, for securing £1,200, and in 1731 this mortgage was assigned to one Baugh, who in November, 1736, reconveyed all the utensils to William Harvest, the bankrupt. By indentures of lease and
E release bearing date Sept. 6 and 7, 1738, Baugh, in consideration of the principal money, by the direction of Harvest assigned over his mortgage to Stephens, and Harvest assigned over a moiety of the utensils as a collateral security. On this mortgage £2,355 is due, so that it is plain that this mortgage will be preferred, as to the real estate, to the Tomkins's, but their mortgage will be preferred as to the collateral security of the utensils. The last mortgage is of William Harvest
F to his son George, dated Mar. 6, 1738, of one-seventh part of his stock, etc., for £1,000.

The question is whether all, or any, and which of these mortgagees will be entitled to resort to the utensils, etc., for a satisfaction, or whether they must come in under the commission. It depends upon whether these mortgagees or any, and which of them, did not so permit the bankrupt to continue in possession as to be
G within the express words of the Bankrupts Act, 1623, s. 10, 11. I will consider this question in three lights.

First, the nature of a mortgage or conditional sale of specified goods or things in possession (of which there might have been an actual delivery), where the bankrupt is suffered to continue in possession until his bankruptcy, and whether there is any difference between such a mortgage, when made to a stranger or when
H made to a partner. Secondly, the nature of three of these mortgages to strangers, as sales partly of things in possession, as utensils, etc., and partly of choses in action, as debts and profits in trade. Thirdly, whether there will be any difference as to the general rule, between such a mortgage made to a partner, and made to a stranger.

Although the present question must be determined upon the construction of the
I statute, yet it is necessary to consider the conditional creditors as to their debts before that statute; but it is previously necessary to clear the case of arguments drawn from the nature of pawns, which are foreign to the present question.

It is contended that pawns among the Romans required a delivery, but that mortgages did not. As to the Roman law, there was an authority cited from JUSTINIAN INST., lib. 4, tit. 6, sec. 7:

> "Nam pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit; at eam, quæ sine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus."

If this passage stood alone, it might go a great way to prove what it was cited for, but when I produce authorities to show that pignus is as valid without a delivery as with one, it must be allowed that these passages have been so interpreted, that pignus can only be of goods capable of delivery, and hypetheca of goods not capable of delivery: DOMAT [LES LOIX CIVILES DANS LEUR ORDRE NATUREL] lib. 1, c. 1, s. 1; WOOD [IMPERIAL CIVIL LAW], lib. 3, c. 2, p. 219; DIGEST, lib. 50, tit. 16. Delivery is, then, not of the essence of a pawn in Roman law, and other countries adopting Roman law have corrected this so that, if a pawn be not delivered, it shall not affect a purchaser for a valuable consideration. If this had been the true distinction, it would have no influence unless the Roman hypotheca and an English mortgage were of the same nature, which they are not, for an hypotheca gave only a lien and no property with a right to be satisfied on failure of the condition and a mortgage with us is an immediate conveyance with a power to redeem and gives a legal property. If a man gives an hypotheca or pignus with a condition that, if the money is not paid at a day, the pawnee shall enjoy the goods at such a price, that is not in the nature of a pawn, but a sale: JUST. COD., lib. 4, tit. 54, s. 2:

> "Si fundum parentes tui ea lege vendiderunt: [ut] sive ipsi sive hæredes eorum emptori pretium quandocunque, vel intra certa tempora obtulissent, restitueretur; teque parato satisfacere conditioni dictae, haeres emptori non paret, ut contractus fides servetur, actio prescriptis verbis, vel ex vendito tibi dabitur: habita ratione corum, quæ post oblatam ex pacto quantitatum ex eo fundo adversarium pervenerunt."

This is the description of an English mortgage in Roman law, and as to the sale of movables, COD., lib. 4, tit. 54, s. 7:

> "Si a te comparavit is, cujus meministi, et convenit, ut si intra certum tempus soluta fuerit data quantitas, sit res inempta, remitti hanc conventionem rescripto nostro non jure petis. Sed si se subtrahat ut jure dominii eandem rem retineat: denunciationis et obsignationis depositionisque remedio contra fraudem potes juri tuo consulere."

All that can be argued from the Roman law with regard to pawns will be foreign to the question, and so will what may be argued from English law with regard to pawns, for delivery is of the essence of an English pawn: Y.B. 5 Hen. 7, 1; BRO., title Pledges, pl. 20, title Trespass, pl. 271, and 2 ROLL. REP. at p. 439 (*Rosse* v. *Bramsteed* (1)), and no authority contradicts these resolutions.

Clark's Case (2) and *Brand* v. *Lisley* (3) are both cases not of pawns but of bailments to a third person, to sell for the use of creditors, and it is true that in these cases the creditor will have an interest in the performance of the contract, and may sue the bailee. There is scarce any book that treats upon pawns but considers them as in the possession of the pawnee, as where it is debated whether a pawn may be used. The difference laid down between a pawn and a distress is that a distress may not be used because the party in that case comes into possession by act of law and in the other by the act of the party: *Mores* v. *Conham* (4); *Coggs* v. *Bernard* (5).

The distinction between mortgages and pawns is laid down in *Ratcliff* v. *Davis* (6). First, "there is a difference between mortgaging of lands and pledging of goods, for the mortgagee has an absolute interest in the land whereas the other has but a special property in the goods to detain them for his security"; per FLEMING, C.J. (Cro. Jac. at p. 245). Secondly, the delivery is nothing but the bare custody, and it is not like to a mortgage, for then he that has the interest ought to have the money, but in the case of a pledge it is only a special property in him that takes it, and the general property continues in the first owner, upon tender of the money secured by the pawn, by the pawner, the property notwithstanding the refusal, is reduced constantly to the pawner without claim: Yelv. 178.

A The next question to be considered will be in relation to the condition of creditors where the debtor continues in possession of the goods mortgaged. This was fraudulent at common law, and the Fraudulent Conveyances Act, 1571 [repealed by Law of Property Act, 1925], ss. 1 and 2, provides against it, that it shall be void. There is no distinction whether the sale be absolute or conditional. Courts of equity and juries are to consider upon the whole evidence whether the conveyance B was made with a view to defraud or not. This Act does not extend to conveyances upon good consideration, unless the circumstances have the appearance of a design to deceive creditors, but where the goods or deeds have been left with the vendor so notoriously as that there could be no design to defraud this has never been looked upon as fraudulent. *Twyne's Case* (7) is a leading case upon fraud on this Act. The transaction there was held fraudulent, although upon good consideration, for C that it was not bona fide, because the vendor was left in possession and traded upon the credit of the goods sold. It is hard to assign a reason why a buyer should leave goods in the hands of the seller, unless to give him a false appearance of circumstances and credit. It was insisted that there were several cases that had made a distinction as to the possession, after a conditional sale, between such conditional and an absolute conveyance of lands and goods.

D I will show that the case of lands is not applicable. In *Stone* v. *Grubham* (8) it was resolved that the grantor's possession of the land was not fraudulent; but SIR EDWARD COKE said that, if the grantor had continued in possession of the original lease, that would have made it fraudulent. Possession can be no otherwise a badge of fraud than as it is calculated to deceive creditors. As to the possession of goods, I have no way of coming to the knowledge of the owner but E by seeing who is in possession of them, but the possession of land is of a different nature, for a man may be in possession of lands as a tenant at will, as a mortgagor is to the mortgagee, before the condition broken. A purchaser may call for the title deeds, and need not be deceived unless he will, but this is not the case of goods, where they are left in the possession of the seller. A second mortgagee shall never be compelled to discover his title: *Head* v. *Egerton* (9), because the F first mortgagee has contributed to draw him in by leaving his title deeds in the mortgagor's hands. There may be a case as in EQ. CAS. ABR. 321, pl. 7 [*Peter* v. *Russell* (10)], where leaving title deeds with the mortgagor will not be construed as a badge of fraud, on account of the particular circumstances: see also *Tourle* v. *Rand* (11).

Bucknal v. *Roiston* (12) was cited. There a supercargo, having shipped goods of his G own, borrowed money at 40 per cent. and made a bill of sale of the goods to the plaintiff. The goods were carried and sold abroad, and upon a question between the vendee of these goods and a judgment creditor of the vendor's, LORD COWPER decreed in favour of the vendee. He took no distinction between conditional and absolute sales, but founded his determination upon the fairness of the transactions. His words are that here was no possession calculated to acquire a "false credit," which H is a plain declaration that a possession so calculated as to acquire a false credit, would have made the transaction void. There is a further saying in the report (Prec. Ch. 285) that it is true that in case of a bankrupt, such keeping in possession after a sale will make the sale void. This must mean such possession as would give a false credit, and all that is laid down there is, that a possession to acquire I a false credit, would make such a transaction void, otherwise not.

Meggot v. *Wills* (13), reported in 1 Ld. Raym. 286 and 12 Mod. Rep. 159, was relied on to support a distinction between conditional and absolute sales. From both these reports it appears that the case was so defectively stated that the court could form no judgment upon it, but sent it back again for a new trial, and the dictum of HOLT, C.J., is against the case for which it was cited. No notice of the statutes of bankrupts was taken in the whole case, but HOLT, C.J., takes it up upon the fraud, and gives it as his opinion that it was not fraudulent. It is very clear that it was not the distinction between a conditional and absolute sale

which weighed with him at all. He distinguishes between a bill of sale to a landlord, and to any other creditor, so that it was his opinion that it was not fraudulent in the case of a landlord. From all these cases it appears that upon the construction of the Fraudulent Conveyances Act, 1571, there is no room to make a distinction between conditional and absolute sales of goods, if made to defraud creditors, but a court or jury are left to consider of this from the circumstances of the case.

The legislature have thought necessary to describe what goods were a bankrupt's or not, and for this purpose the Bankrupts Act, 1623, s. 10, was made, which is the preamble to s. 11, though it is printed with the former section by mistake, says:

> "And for that it often falls out that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own."

Merely considering things in possession, the mischief was that these persons, before the Act, made over their goods, and yet were suffered to continue in possession, as if the goods were still their own, and this was the thing intended to be remedied, and there is no distinction made here between absolute and conditional sales. Consider the enacting clause:

> "Be it enacted, that if at any time hereafter any person or persons shall become bankrupt, and, at such times as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners, that in every such case the said commissioners shall have power to sell and dispose the same, as fully as any other part of the bankrupt's estate."

It is not to be doubted but as the preamble makes no distinction between absolute and conditional sales, so the enacting clause will take in the one as well as the other. The only thing contended for is whether the mortgagee shall be considered as the true owner or the mortgagor, and there is no doubt the conditional vendee is the true owner or proprietary, and there is no reason to make a distinction between an absolute and conditional vendee, but by confounding the difference between pawns and mortgages. Some doubt might arise if this was the case of a pawn, as in *Waller* v. *Hanger* (14) (3 Bulst. at p. 17), but it cannot be doubted in the case of a mortgage, for it is an immediate sale to the mortgagee, and although the mortgagor may buy it again, or redeem by favour of a court of equity, yet until then, the vendee is the absolute proprietor.

On a pawn, the pawn is complete by a delivery, but on a conditional or absolute sale, the sale is complete by the contract, and the party is entitled to a delivery of the goods as soon as he has paid the price: *Langfort* v. *Tiler* (15) (1 Salk. 113); *Core's Case* (16). If, therefore, a conditional vendee pays money, and does not insist upon a delivery of the goods, he confides in the credit of the vendor and not in any real or particular security, and ought to come in under the commission, as much as any other person that places a confidence in the bankrupt, and not in any other security.

As there is no authority to warrant a distinction between absolute and conditional sales, so there is a case that destroys it: *Stephens* v. *Sole* (17) in Chanc. Trin. 1736. A trader within the statute having possession of a leasehold estate, assigned it, and made a bill of sale of three hoys redeemable. In May, 1731, he became a bankrupt, and the defendants were the assignees under the commission. The plaintiff brought a bill to be paid his principal, etc., or to foreclose; and it was admitted that the leasehold was insufficient to pay the plaintiff, but as to the hoys, it was insisted that as the bankrupt had continued in possession of them, they were liable to the commission. Lord Talbot decreed upon this admission that there should be

A a foreclosure as to the leasehold, and that the plaintiff should be admitted under the commission, for so much of his debt as the leasehold would not satisfy, and decreed that the money arising by the sale of the hoys should be applied to the payment of the creditors under the commission. But it was insisted that there has been a subsequent case contrary to this, *Bourne* v. *Dodson* (18), Dec. 4, 1740, in Chancery. It is sufficient to say there was in that case no judicial determina-
B tion. The Lord Chancellor did then consider the inconveniences that might arise if it should be held that ships at sea, of which no possession could be delivered until their return, should be subject to a bankruptcy.

There was another case before LORD HARDWICKE, on Oct. 22, 1746, *Brown* v. *Heathcote* (19). Williams and Wilder, partners, indebted to Heathcote in £1,200, assigned their ships to him, and delivered over the charterparty, invoice, etc.
C Williams became a bankrupt, the ships came home, and it was contended that as there was no delivery of the possession, it was within the Bankrupts Act, 1623, but LORD HARDWICKE was of a contrary opinion as every evidence of ownership was delivered over to the assignee, and all means were used to obtain an actual delivery as soon as the ships came home, and that the statute was designed against those only who had neglected some act to put themselves in possession of the goods
D conveyed and by that means had led other people into a deceit: that there could be no consent or dissent as to the possession of ships at sea, and so not within the words of the Act, nor within the reason of it, which was to hinder persons from gaining a false credit, for here the owners had delivered over every evidence of ownership and could not prove by any other means that they were owners. I should think that the delivering over of the muniments was a delivery of the ship,
E as the delivery of the keys of a warehouse is a delivery of the goods in it.

To apply this to the two mortgages—that of Tomkins in 1723, and that of Stephens in 1738. These mortgages are of a lease with fixtures and movable goods. As to the fixtures, nobody can remove them until the mortgage is satisfied, for although a lessee may remove fixtures during his term, yet, if he leases his whole term, he cannot, any more than a lessor during the term, and a sheriff may
F take them in execution: *Poole's Case* (20). As to the utensils not fixed, they will come under the same consideration as goods granted without a delivery of possession. A lease of a house with movables is only a gift of the utensils during the term: *Spencer's Case* (21); *Read* v. *Lawnse* (22). As to the fixtures, we need not consider them with regard to the mortgage in 1738, because they will be exempted by the first mortgage, but as to the utensils not fixed, they will stand in the same
G condition as others. A partner is possessed per my et per tout (*West* v. *Skip* (23), 1 Ves. Sen. at p. 242), and, therefore, no actual delivery can be made to him, but the offence against the statute is permitting one to continue in possession when he has sold all the goods to another, who is thereby entitled to the possession of the entirety, and Stephens permitting Harvest to continue as half owner of them is the case mentioned in the statute. As to the mortgages of one-seventh share of the
H bankrupt's moiety of the partnership stock, etc., in trade, before I go into the consideration of this, I will consider the case of an assignment of a mere chose in action.

The simple case is of a bond; such chose in action is assignable in equity, and not at common law. The reason is because the assignor can furnish the assignee with all the means of reducing it into possession, for he can let him sue in his
I name. Why, therefore, is not the means of reducing anything into possession as necessary as the delivery of the thing itself in the other case? Suppose a trader assigns over a bond, and the assignee permits him to keep the bond in his possession, why should not that be within the mischief of the statute? A bond debt is a chattel, although some doubt has been made of this, but the doubt arises hence, not that they are not chattels in their nature, but that they are not grantable to a common person; but if they were granted to the King they would pass as chattels: BRO. Prerogative, 50; 3 INST. 55.

In *Ford and Sheldon's Case* (24), the resolution is that personal actions are as

well included within the word "goods," as goods in possession. Therefore if a bond is a chattel and the assignment is a conveyance of it, the bond being left in the hands of the assignor, is in his possession and he may assign it to a second assignee, or may show it to any creditor, as an evidence of so much money owing to him, and deceive him by it. And as he can have it by no other means, but by the consent of the true owner in equity, he may thank himself for it. In mortgages of lands possession need not be delivered, but the title deeds must, and so should the deeds and securities of choses in action. It is said that a debt in trade is a mere chose in action, and will pass by an assignment even the day before the assignor becomes a bankrupt, as in *Small* v. *Oudley* (25). [BURNET, J., stated this case, and the reason of the judgment.] An observation was made that this was an assignment of a share in another man's trade, and not in his own, and the only reason of it might be that here he could give no possession. A stress was laid upon this.

Every man in his own trade is in possession of the choses in action that arise from his own goods, and can put another in possession either by giving him the securities, or by admitting him a partner for such a share. It is no uncommon thing to argue against assignees of a bankrupt from the nature of the goods, in respect to the choses in action arising out of them, and also in respect to the new goods or profits. If this kind of argument will prevail against them, it ought to prevail in their favour. Suppose goods are consigned to a factor who sells them and breaks, the merchant for the money must come in as a creditor under the commission, but if the money is laid out in other goods, these goods will not be subject to the bankruptcy: *Whitecomb* v. *Jacob* (26). Suppose, instead of selling the goods for ready money, he sells for money payable at a future day and breaks before the day, if the assignees receive the money, it will be for the use of the merchant. Or suppose that the factor had taken notes for the goods, if his assignees receive the money upon these notes, it will be to the merchant's use. This was determined in the Court of Common Pleas: *Scott* v. *Surman* (27), Hilary, 1742. By parity of reason the rule will hold here that as the specific goods, by being left in the bankrupt's possession, would be subject to the commission, so must the profits be in choses in action arising from these goods, and, therefore, these mortgagees can come in only as general creditors.

As to the last point, with regard to the assignment of Harvest's whole moiety of the partnership stock in trade to Potter in trust for Stephens, the other partner, it will either fall under the consideration of an assignment to Potter as a distinct person or of an assignment directly to Stephens. The considering it in either of these lights will not vary the determination of the case, for considered as an assignment to Potter, it is difficult to say why Harvest, after he had conveyed over all his share of the partnership trade, should continue still acting as the owner of it, unless it was done to acquire a delusive credit, and considered as an assignment to Stephens, his permitting Harvest to continue in possession with him, will be construed as a fraud against other persons. I apprehend that Stephens was the true owner of this moiety, and has permitted the bankrupt to continue in possession of it, as if he was the true owner, and that Harvest has taken upon himself the disposition of this moiety as the owner thereof, and that this comes within the words, mischief, and intent of the Act of 1623. If it was not to be so construed, what a door would it open to frauds.

But it is insisted that partners in transactions with each other have the partnership stock for a security, but not more, or otherwise than in the case of strangers, for whether a partner or a stranger lends money to the partnership, they are to be first satisfied out of the partnership stock: *Earl of Craven* v. *Knight* (28); *Richardson v. Gooding* (29); *Ex parte Crowder* (30); and *Croft* v. *Pyke* (31), which is as strong as any negative case can be. [He then stated *Croft* v. *Pyke* (31), and said there the executor insisted upon a right to retain as executor, but not as partner.] It may be said that it will be laying trade under a great restraint if a trader cannot mortgage his goods or stock without quitting trade, and to be sure cases

may occur in which there may be an inconvenience, but the inconveniencies on the other side strike me more strongly. A man ought to quit his trade when he has no stock to carry it on, for if it is once established that the friends of a sinking man may secure themselves by mortgages upon everything that he has, without running any risk, commissions of bankruptcy will be very useless things. I must, therefore, conclude that these mortgages of goods, etc., capable of a delivery, will be liable to the commission by force of the Bankrupts Act, 1623.

SIR THOMAS PARKER, C.B., made four questions. (i) Whether any mortgage or sale upon condition is within the statute of 1623; (ii) whether mortgages or sales upon condition of specific chattels are within the statute; (iii) whether mortgages, etc., of particular parts or shares of trade are within the statute; (iv) whether the mortgage of Harvest's moiety to Potter is within the statute. He laid the cases of pawns and hypothecation out of the question. Fraudulent deeds, he said, might be avoided at common law. By the Fraudulent Conveyances Act, 1571, they are also made void, with a proviso that this does not extend to conveyances made upon good consideration and bona fide. He cited *Twyne's Case* (7) to show that the transaction there was not bona fide. He then read the preamble to the clause, and the enacting clause of the Bankrupts Act, 1623. This clause, though it does not speak of fraud, was intended to prevent that false credit which is the destruction of trade, and meant to give a further benefit to the creditors of a bankrupt, than was given to them by the Bankrupts Act, 1571. It extends to conditional as well as absolute conveyances, or else a bankrupt might mortgage for almost the whole value. The principal difficulty upon this case arises upon the words of the statute "by the consent and permission of the true owner," and it is insisted that they are only applicable to absolute and not to conditional sales, because a mortgagor, having a right to redeem, is considered as the true owner. But the words are put in opposition to the false and pretended ownership, the bankrupt appearing to have the true ownership of the goods by the possession, and if a contrary construction was to take place, it would be fatal. This was determined in *Stephens* v. *Sole* (17).

The second question is whether mortgages (or sales upon condition) of specific chattels are within this clause. It is allowed to be out of the question that the stock mortgaged underwent changes, for there is no doubt but the produce is subject to the mortgage of the stock itself. (i) It may be a question whether the bankrupt's goods only, or the goods of other persons left with him for safe custody, or sale, are within this clause; (ii) whether any, and which, of the goods are within this clause. The enacting clause speaks of any goods, the preamble speaks only of the bankrupt's own goods. It is laid down in *Barker* v. *Redding* (32) on the construction of the Sale of Horses Act, 1588, that the preamble shall not restrain the enacting clause. But I take it to be agreed, that if the not restraining the generality of the enacting clause will be attended with an inconvenience, the preamble shall restrain it: and this is the case here, for otherwise merchants could not correspond or carry on their business without great danger, and great difficulty. *L'Apostre* v. *Le Plaistrier* (33) was rightly determined. I have my account of it from a short note of SIR EDWARD NORTHEY'S. So in *Godfrey* v. *Furzo* (34), where LORD KING took this difference. When a merchant abroad consigns to B., a merchant in London, for the use of B. and draws on B. for the goods, although the money is not paid, the property vests, and they are the goods of B., the merchant here, and liable to his debts, but where goods are consigned to a factor, as a servant, no property vests in him, nor will the goods be liable to his bankruptcy.

In *Ex parte Marsh* (35), Aug. 1, 1744, a bankrupt received £600 in money, goods, and pieces of plate, the property of his wife, and, by deed before marriage agreed that the same should be secured to trustees for her separate use as if she was a widow, and he gave a bond and warrant of attorney to confess judgment, and conveyed the plate to trustees in trust for the benefit of the children by the former

husband. The wife appointed it by her will accordingly. It was ordered that the children, the petitioners, should be admitted to come in under the commission for the £600 and that the plate in the custody of the bankrupt should be delivered to them, for that the money, having no earmark, could not be followed, but the plate might.

In *Copeman* v. *Gallant* (36), I must own that LORD COWPER, L.C., exploded the notion of the preamble's governing the enacting clause, and went upon another reason, which was that the assignment was with an honest intent and to pay the debts of the assignor. I have great honour for LORD COWPER, but, though I approve of the decree, I cannot subscribe to the reasons of it, for notwithstanding an honest intent will entitle a person to all due regard, yet an honest intent cannot take a case out of the clause of the statute. Suppose a person acted by commission only, could there be any pretence to say that persons who advance their money do advance it upon the credit of his stock, for to him the credit is given? So, where a person acts partly upon his own stock and partly as a factor.

Secondly, whether any, and which, of the goods mentioned are within the clause, and whether any, and what, possession is required to be delivered. The goods are, utensils, hops, malt, fixtures to the freehold, and stock in trade.

As to the fixtures, they are like trees: *Stukeley* v. *Butler* (37) (Hob. at p. 173). HOBART, C.J., says that by the grant of the trees by a tenant in fee simple they are absolutely passed away from the grantor and his heirs and vested in the grantee, and go to his executors and administrators, being, in the understanding of the law, divided, as chattels from the freehold, and the grantee has power incident to and implied from the grant to fell them when he will without any other licence. OWEN 49: An action is maintainable there, for the trees were re-united to the land by the purchase of the inheritance. To apply this, the fixtures had been several times mortgaged distinctly from the freehold, but were all re-vested and re-united after that, and there was no occasion to deliver them, but they would well pass by the mortgage of the freehold to the Tomkins's. I admit that in *Poole's Case* (20) it is laid down that these things may be taken in execution, but I think a distinction is to be made, for here they could not be removed by Harvest, or taken in execution, by reason of the mortgagee's interest. Therefore, I think the coppers and fixtures are liable to the Tomkins's mortgage.

With regard to the utensils, etc., not fixed. Where goods mortgaged are capable of an actual delivery, there ought to be an actual delivery, but if they cannot be delivered at the time of the contract, it will be sufficient if the mortgagee has the documents and muniments delivered to him in order to reduce them into possession. The delivery of a key is the delivery of the possession, according to the civil law: DIG. 41, t. 1, l. 9, p. 5; vide DOMAT. *Brown* v. *Heathcote* (19), mentioned by BURNET, J., turns upon this principle. It is objected that the undivided share of the stock, etc., in trade, will not admit of a separate property and separate possession, and, therefore, that the possession of the mortgagor is the possession of the mortgagee. It is true that partners have a joint stock, but their possession is several, and the interest is to some purposes several, as if a sheriff seizes a joint stock for a separate debt, he cannot sell the whole: *Tiffard* v. *Warcup* (38); *Bachurst* v. *Clinkard* (39); *Heydon* v. *Heydon* (40).

I will now consider the cases cited for the defendants. In *Meggot* v. *Mills* (13), the clause of the Bankrupts Act, 1623, was not considered, and one would imagine from the expression of HOLT, C.J., that, if the sale there had been made to any other person than the landlord, it would have been fraudulent. *Cole* v. *Davies* (41) admits of the same observation as the other case, and I have some doubt whether it was not compounded with a trust. Besides, the case was not within the Act of 1623 because the sale was by the sheriff and not by the party, so that he did not take upon him the sale and disposition as owner.

In *Small* v. *Oudley* (25), SIR JOSEPH JEKYLL, M.R., distinguished between a man's own trade and the trade of another person, and the reason of that was because the bankrupt was not in possession, and could not deliver the goods, and unless

A they could pass by assignment, they could not pass at all. *Bucknal* v. *Roiston* (12) was a case of a bill of sale of the produce of a cargo going to sea, and it depended solely on the law of merchants, for there was no bankruptcy in that case. Lord Cowper says that in the case of a bankrupt, such keeping possession after a sale will make the sale void against creditors, so that this is an authority rather against the defendants than for them. In the present case the possession of the goods B was not delivered, although capable of delivery; the bankrupt had the evidence of the partnership in his hands, and acted as owner; and the mortgage was a secret to everybody but the parties; so that all the circumstances mentioned in the Act concur to bring this case within it, and, consequently, I think these are things liable to the bankruptcy.

The third question is whether sales or mortgages on condition, of particular parts C or shares of trade, and the produce of trade are within this clause. I shall confine myself here to things in action, as such mortgages are like so much of the balance mortgaged. It is objected that this clause does not extend to things in action, because it speaks only of things in the possession of the bankrupt at the time of the mortgage. But chattels comprehend things in action: *Slade's Case* (42) (4 Co. Rep. at p. 95 a). Things in action are goods and chattels in a person attainted. D *Clayton's Case* (43); *Ford and Sheldon's Case* (24). If goods and chattels will comprehend things in action in the construction of any Act of Parliament, they ought much more to do so in this, for otherwise a trader might cheat his creditors by assigning over such things. This is enforced by the first clause of the Act, where it is provided that everything shall be construed most beneficially for the creditors. It is further objected that things in action are not assignable but in E equity, and do not admit of a delivery. If a bond is assigned, the bond must be delivered and notice must be given to the debtor, but in assignments of book debts, notice alone is sufficient, because there can be no delivery. Such acts are equal to a delivery of goods which are capable of delivery. Domat, lib. 1, tit. 2, s. 2, par. 9, says that things incorporeal, such as debts, cannot properly be delivered. This is to show the nature of assignments of debts by notice to the F debtor. This clause, therefore, extends to things in action, and all has not been done that might have been done by the assignee to vest the right of them in himself, and to take away from the bankrupt the power and disposition of them, for no notice has been given to the debtors.

The fourth question is whether the mortgage of William Harvest's moiety of the partnership stock and trade be within this clause. This is the most difficult question. It is objected that although Potter did not take possession, yet he was merely a nominee for Stephens, and that Stephens, being partner before, was in possession as partner per my et per tout. But the question still remains whether, when Stephens became entitled to the whole stock, he should not have taken the sole possession exclusive of Harvest, in order to take the mortgage out of the statute. I think he ought to have taken possession of the whole. For according to the fact in this case, Harvest at the time of his bankruptcy continued, and appeared to be, in possession of one moiety of the partnership stock, etc., by the consent of Stephens. It is said that the law will construe Stephens to be in possession according to his right, There is no reason for such a construction, as Stephens suffered Harvest to continue to act inconsistently with his right. Another difficulty is that the partnership stock is in the first place liable to the partnership account, according to the authority of *Croft* v. *Pyke* (31), and that this is no more than applying the partnership fund, which was to pay the partnership creditors, to the use of a partner who has made them a satisfaction another way, as where one of the partners is charged with more than he ought to be, equity gives him a lien on the partnership stock to reimburse himself. But this is not applicable to the present case because Harvest did not borrow any of the partnership money, or embezzle any of the partnership effects, nor was the transaction a partnership transaction, or the money lent upon the partnership account. This principle of equity has never been extended to private loans, but it has always

been confined to partnership transactions, and I think it proper it should be so confined.

LEE, C.J.—I agree with BURNET, J., that these securities are to be considered as mortgages, and I shall consider them in that light. At common law it was left to the jury to consider whether conveyances of this sort were fraudulent against creditors or not. This case must be determined upon the statute of 1623. The Fraudulent Conveyances Act, 1571, is only declaratory of the common law, and as all the cases upon that statute have been fully answered by the Chief Baron and BURNET, J., I shall say nothing more upon these cases or upon that statute, but shall confine myself to the Act of 1623 because I think that there the line is drawn, and the certi fines are to be found there.

The question will be (i) whether the mortgage is not the true owner to whom there should have been a delivery; (ii) whether the debts and choses in action should not have been delivered as far as they were capable of delivery; (iii) whether Stephens has had such a possession as will exempt him from being considered as an owner, by whose consent the bankrupt has had goods and chattels in his possession, and taken upon him the disposition thereof. By goods and chattels I mean such as were fixed to the freehold, and might be severed when the mortgage was satisfied.

The general preamble to this statute says that several defects had been found in the former statute, and that one of them was in the power given to the commissioners for the discovery and distributing of the bankrupt's estate. The particular preamble to this clause recites:

> "That persons before they become bankrupts do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof and dispose the same as their own."

The clause now in question is the provision against this mischief, and every word is to be considered. This case is within the preamble, for the bankrupt has conveyed the goods to the mortgagee, and as this falls within the words of the preamble there is no occasion to give any opinion whether the preamble is to restrain the enacting clause or not. By the Fraudulent Conveyances Act, 1571, there was an express proviso that it was not to extend to conveyances bona fide, and this was the difficulty for the commissioners to discover. I apprehend that the direction there given that if any person shall become a bankrupt and have in his possession goods, etc., was to remedy the inconvenience that arose in injuries upon the former statute, whether the sale was bona fide or not, by making the reputed ownership of the bankrupt the real ownership in him for the benefit of his creditors, because, if the true owner suffers the bankrupt to become the reputed owner, he deprives himself of the benefit of his conveyance, and the bankrupt having gained a credit by his means and hurt his other creditors he shall be in no better condition than they are.

Is the mortgagee then the true owner? The Act of 1623 describes the mortgage in these words:

> "If any person that becomes a bankrupt shall convey or assure, [etc.] any lands, tenements, hereditaments, goods, chattels or other estate, unto any person upon condition or power of redemption at a day to come, by payment of money or otherwise . . . "

This is the description that the statute has made of a mortgage, not only of land, but of goods upon condition. Co. LITT. 210 a: If a man makes a feoffment in fee, upon condition that the feoffee shall pay the feoffor, his heirs or assigns, £20 at such a day, and before the day the feoffor makes his executors and dies, the feoffee may pay the same either to the heir or the executors, for the executors are his assignees in law to this intent. But if a man makes a feoffment in fee upon condition that, if the feoffor pay to the feoffee, his heirs or assigns, £20 before such a feoffment, and before the feoffment the feoffee makes his executors and

dies, the feoffor ought to pay the money to the heir and not to the executors; for the executors in this case are no assignees in law. The reason of this difference given in the book is that the feoffor has but a bare condition, and no estate in the land which he can assign over; but in the other case the feoffee has an estate in the land that he may assign over, which is in other words saying that the mortgagee is the owner, and has the interest in him. *Ratcliffe* v. *Davis* (6) (2 Cro. Jac. 244) cited by BURNET, J., as to the difference between a pawn and a mortgage goes to the same matter.

The difference taken between conditional and absolute sales, and the cases thereon have been observed upon already. I shall only mention one of them. *Stone* v. *Grubham* (8) (2 Bulst. at p. 226) was a case of a condition upon a future consideration. The words of SIR EDWARD COKE which are relied upon are that the possession of the mortgagor was not fraudulent, but if it had been an absolute conveyance, it would have been fraudulent.

I look upon this case to have been determined entirely upon the Fraudulent Conveyances Act, 1571, and the common law, the plan of which statute differs from that of the Bankrupts Act, 1623. It is against fraudulent conveyances, with a proviso in favour of conveyances bona fide, whereas the Act of 1623 supposes a fair conveyance, but deprives the party of any preference, because he does not give proper notice of his conveyance. It seems to me that the cases upon this statute are more like the cases that may happen upon the Registering Acts, where a person does not register, and so loses the priority of the security: so here the donee is not to suffer the donor to continue in such a possession, as is prescribed against by the Act. Although the case cited is not material to the point in question, yet I think nothing of what was said in that case establishes a difference between a conditional and absolute sale; yet it is material that a mortgagor, who continues in possession, is before the condition broken tenant at will to the mortgagee, which shows that the mortgagee must be considered as the true owner of the land. As to the other cases cited to establish this difference between conditional and absolute sales, I shall not go over them again, because they have been fully answered.

Stephens v. *Sole* (17) is a case in point on a mortgage of a personal thing, and LORD COWPER's saying in *Bucknal* v. *Roiston* (12) is an authority upon this question, though upon another point, for he says in *Bucknal* v. *Roiston* (12) (Prec. Ch. at p. 286), that

> "such a keeping possession after a sale" (as is described by the [Act of 1623], which is a possession with the liberty of the disposing the goods as his own) "would make the bankrupt's sale void against his creditors by the statute."

This case, therefore, must be considered as an authority to the same purpose with that determined by LORD TALBOT [i.e., *Stephens* v. *Sole* (17)], and both determine the question with regard to specific goods.

I am of opinion that it will be the same as to the shares of the partnership stock, partly in possession and partly in action, and as to all choses in action, as debts capable of being assigned in a court of equity. Some books, indeed, as SWINBURNE (6th Edn.), p. 498, seem to countenance an opinion that goods do not include bonds, etc. For notwithstanding he says, that by goods the civil law understands not only things in possession, but also things for which a lawful action may be had, yet in the same page he lays it down that, by the laws of this realm, the word "goods" is otherwise understood, and never includes things which are of the nature of freehold, nor things in action, as a debt upon a promise, or obligation. So *Calye's Case* (44) carries some appearance of the like opinion, where it is said that an innkeeper is answerable for the lots of a bond, being obliged to keep the goods and chattels of his guest, for although it is there said that goods and chattels do not properly comprehend charters and evidences concerning a freehold, or inheritance, or obligations, or other deeds or specialties beings things in action, and yet, in this case, the writ against an hosteler or innkeeper is expounded to extend to them. I apprehend that these opinions were grounded upon the

notion that choses in action did not pass even by statute, any more than they were grantable by a bargain and sale, etc., but there are so many authorities to contradict them that I take that point to be settled.

A corporation cannot take a recognisance or obligation in their public capacity, because they cannot take a chattel. "Catalla" comprehends a right of action, and is the only word in the statute to give this right. This point was in question in *Ford and Sheldon's Case* (24) (12 Co. Rep. at p. 1 b), whether choses in action come under the word "goods," and it is there said that personal actions are as well included within this word "goods" in an Act of Parliament as goods in possession.

If "goods and chattels" in the statute include choses in action, all things arising from the sale of the joint stock are subject to the assignees, as they follow the nature of the goods themselves, and BURNET, J., has cited cases to show that they are so where the thing can be discovered. SWINBURNE (6th Edn.), p. 506, is upon the same foundation: If a man devises his movable goods to B. and his immovable to C., upon a question how the debts shall go, he says that those debts which did arise by occasion of the things movable, for the recovery whereof there lies an action personal, belong to that person to whom the testator did bequeath his movable goods, which shows that the produce of the goods were of the same nature with the goods themselves.

As to Stephens's mortgage, it being made to Potter in trust for Stephens, it is to be considered as a mortgage to Stephens, and as to the objection that Stephens, being in possession, wanted no new possession to be delivered, the answer has been given, that Harvest had the possession with the consent of the true owner, which he ought not to have had.

Croft v. *Pyke* (31) is the case that was called a negative one. Although this has been nowhere determined yet one may use a citation from a civil law book, not as an authority upon which a judgment is to be founded, as it has not been received here, but as the opinion of learned men. [For this saying he cited *Blackborough* v. *Davies* (45) from a manuscript note, where HOLT, C.J., advances the same thing.] I shall, therefore, mention DOMAT, lib. 1, fo. 155, where he says that debts owing by the partnership and their other charges are to be borne out of the common stock, otherwise as to the money borrowed by a partner which has not been applied to the common stock. I mention this to prove that the partnership stock is no further subject to debts from one partner to another than as the money has been applied to the partnership trade.

On the whole, the statute of 1623 is the rule to be followed in this case. The intent of it was to prevent bankrupts from acquiring a false credit, and to punish accessories by the loss of the priority of their debts. Whether this was a wise provision or not is not for us now to determine; it must be followed as long as the Act continues in force.

LORD HARDWICKE, L.C.—This is a question of great consequence. I will endeavour to reduce the grounds I go upon to some general heads: (i) whether any mortgage or conditional disposition or conveyance of any goods and chattels is within the Bankrupts Act, 1623, s. 10, s. 11; (ii) if any is, whether the present mortgages, and which of them are so; (iii) whether the mortgagee of the moiety of the partnership's stock, etc., is within the Act.

As to whether any mortgages or conditional conveyances of goods are within the Act under this general question, I shall not enter into a particular disquisition of the two points made at the Bar: (i) If the enacting clause extends to all goods in the custody of the bankrupt, whether his own originally or not, or whether it is to be restrained by the preamble to goods only that were originally the bankrupt's; or (ii) whether choses in action are within the clause. As to the first, the Chief Baron has entered so far into the construction of it as not to leave any room for doubt. However, let the construction be what it will, the present case as to this point is within the Act, because it is not disputed but that all the goods here in question were originally the bankrupt's and were mortgaged by him. But still in

this respect I shall not scruple to declare that I am strongly inclined to be of opinion with HOLT, C.J., and my Lord Chief Baron that this clause is to be restrained by the preamble, and differ from LORD COWPER in *Copeman* v. *Gallant* (36). As to the other point, it has been fully cleared up that choses in action are properly within the description of goods and chattels in this clause. But I will add one argument. It is that the construction which has been put upon this clause is supported by the next immediate precedent clause in the Act. It relates to bankrupts, who by fraud make themselves accountant to the King to defeat their creditors, where there is a power given to the commissioners to dispose of all lands, tenements, hereditaments, goods, chattels, and debts of the bankrupt so extended, to and for the use of the creditors, and yet, when it comes to the provision, it rests entirely upon the words "lands, tenements, goods and chattels," and was designed to comprehend all kind of personal property, whether in possession or action only. In *Ford and Sheldon's Case* (24), it is laid down that in an Act of Parliament the words "goods and chattels" take in choses in action, and the contrary opinion seems to have arisen upon questions on grants, and bargains and sales, by which they could not pass, but an Act of Parliament, which may pass anything, will take in the whole.

The aim of the legislature in all statutes concerning bankrupts was that the creditors should have an equal proportion of the bankrupt's effects as far as possible. And it was intended that this Act should be construed beneficially for the general creditors, and it is so declared in an unusual manner in the first clause of the Act. The general view of the provision now under consideration was to prevent traders from gaining a delusive credit from a false appearance of their circumstances, to the misleading and deceit of those who should trade with them, and the legislature thought they had done this by subjecting all things remaining in the possession of the bankrupt to the creditors under the commission, because where the vendee leaves the goods bought in the possession of the bankrupt, he confides as much in the general credit of the bankrupt as that creditor who has taken only a bond or note. In such cases the bankrupt had it in his power to sell all the goods the next hour, and the vendee or assignee could not claim them from the buyer, but could only have a personal remedy against the bankrupt. All this holds as well in the case of conditional as of absolute sales, and if the court should make a different determination it would be contrary to *Stephens* v. *Sole* (17), determined by LORD TALBOT, and to *Bucknal* v. *Roiston* (12), by LORD COWPER, and to the implied opinion of the last in *Copeman* v. *Gallant* (36). I choose to forbear observing upon the words of the clause, because that has been done already. The legislature has explained its sense by putting the words "true owner" in opposition to "the reputed owner."

The second question is whether any, and which, of the mortgages are within the statute. According to the authority of the cases which have been mentioned the mortgages of Dec. 10, 1737, and of Sept. 6 and 7, 1738, and so much of the assignment to Stephens as relates to the utensils not fixed to the freehold, and also the mortgage of Mar. 6, 1738, are within the statute, and made void by it. If it was to be laid down that a share of the partnership trade, etc., mortgaged to a partner is not necessary to be delivered, it would let in all the inconveniences which were to be prevented by this statute.

As to choses in action, equity ought to follow the law; if it does not, infinite mischief would follow. It is easy to turn a legal into an equitable interest, and if Parliamentary provisions as to a legal interest were not to be followed as to equitable interests it would defeat the Act. Thus upon the Popish Acts, although penal, the considerations and rules are the same in equity as at law.

It was said that the mortgage to Potter for the benefit of Stephens must be considered as a mortgage to Stephens, and it may be generally right to consider it so, though yet, as a judge in equity, I am inclined to carry it further than the judges at common law have done, for whatever interest passed of the personal things, passed in law to Potter, and if the case had been at common law a court of

law would not have taken any notice of the trust for Stephens, and then by the statute this assignment had been void at law against the commissioners, and a court of equity would never set it up here. Therefore, I make a difference between such things as being assignable only in equity, gave no title to Potter at law, for as to these the mortgage is to be considered as being made directly to Stephens, but as to those things in which an interest passed at common law to Potter, I think Potter is to be considered as having the legal property.

As to the question whether partnership stock is to be first liable to the debts of the partners, it was never carried further than to debts contracted relative to the partnership, either after the bankruptcy, or death of one of the parties. Where a partner lends money to another generally, and it is not entered in the partnership books, it is said he gains a specific lien upon the share of the borrower, and shall be preferred to separate creditors, but I find no foundation for this after a bankruptcy, nor after the death of a partner, where his effects have become subject to the rule of distributing assets. What equity there may be between partners themselves, on settling an account, is another thing. *Croft* v. *Pyke* (31) is as strong a negative case to this purpose as can be, all that was contended for there, being that he might retain as executor. If it should be determined that one partner should gain a specific lien by lending money to the other upon the partnership stock, it would open a door to great fraud, and give a shock to this Act, which is made on purpose to prevent a false and delusive credit.

I will take notice of one thing mentioned by BURNET, J., and the Chief Justice. It has been said in this cause that great mischief might arise to trade and credit from making securities of this kind void, because it might prevent persons from using their credit in trade, and that they will not be able to make a security without exposing their circumstances to the world, which may hurt their credit. On the other side it has been argued that a delusive credit is still of more dangerous consequence. I will not say but some inconveniences may arise on each part, but I agree with the Chief Justice that, as it is a law, it must be adhered to, and we cannot depart from it. If any inconvenience does arise, it is for the consideration of the legislature whether it ought to be allowed or not. But this I will say, that very great inconveniences may arise by giving an opportunity to people to make such securities and yet appear to the world as if they had the ownership of all those goods of which they are in possession, when perhaps they have not one shilling of the property in them. Further I will venture to say that it was the design of the Act of Parliament to prevent this, for the Act was made in the simplicity of former times, long before those large and airy notions of credit prevailed which have been since introduced. This Act is a law, and I concur with my Lords the judges in the opinion that they have given, and the construction that they have put upon it. I do, therefore, determine that these mortgages and securities are not a lien upon the bankrupt's estate.

PENN AND OTHERS *v.* LORD BALTIMORE

[Lord Chancellor's Court (Lord Hardwicke, L.C.), May 15, 1750]

[Reported 1 Ves. Sen. 444; 27 E.R. 1132]

Boundary—Determination—Agreement between landowners—Enforcement.

Boundaries may be fixed by the agreement of adjoining land owners, and the boundaries so settled are to be presumed to be the true and ancient limits. Though nothing valuable is stated in the agreement to have been given on the one side or the other, the settling of the boundaries and the peace and quiet so obtained is a mutual consideration to support an action for the enforcement of the agreement.

Conflict of Laws—Specific performance—Contract relating to real property abroad—Party resident in England—Enforcement in personam.

An English court has jurisdiction to enforce in personam against a party resident in England by a decree of specific performance a contract relating to real property abroad.

Specific Performance—Refusal of decree—Contract not supported by consideration—Mistake—Delay.

The court will not grant an order for the specific performance of a contract which is not supported by consideration. Nor where there has been a mistake in the contract contrary to its intent. The objection that the time for performance has lapsed may be answered, for it is the business of a court of equity to relieve against lapse of time in the performance of an agreement, especially where the non-performance has not arisen by the default of the party seeking specific performance.

Notes. Explained: *Pike* v. *Hoare* (1763), Amb. 428; *Re Courtney, Ex parte Pollard*, [1835–42] All E.R.Rep. 415. Considered: *Norris* v. *Chambers* (1861), 29 Beav. 246. Explained: *Cookney* v. *Anderson* (1862), 31 Beav. 452. Considered: *Sichel* v. *Raphael* (1864), 3 New Rep. 662. Explained: *I.R. Comrs.* v. *Angus, The Same* v. *Lewis* (1889), 23 Q.B.D. 579. Considered: *Companhia deMoçambique* v. *British South Africa Co.*, *De Sousa* v. *British South Africa Co.*, [1892] 2 Q.B. 358; *Black Point Syndicate* v. *Eastern Concessions* (1898), 79 L.T. 658. Referred to: *Bayley* v. *Edwards* (1792), 3 Swan. 703; *Houlditch* v. *Donegal* (1834), 8 Bli.N.S. 301; *Lord Portarlington* v. *Soulby*, [1824–34] All E.R.Rep. 610; *Re Holmes* (1861), 2 John. & H. 527; *Douglas* v. *Douglas*, *Douglas* v. *Webster* (1871), L.R. 12 Eq. 617; *Ewing* v. *Orr Ewing* (1883), 9 App. Cas. 34; *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *A.-G.* v. *Johnson*, [1907] 2 K.B. 885; *British South Africa Co.* v. *De Beers Consolidated Mines*, [1910] 1 Ch. 354; *British Controlled Oilfields* v. *Stagg* (1921), 66 Sol. Jo. (W.R.) 18; *Re Boundary between Canada and Newfoundland in Labrador Peninsular* (1927), 137 L.T. 187; *Re Anchor Line (Henderson Bros.), Ltd.*, [1937] 2 All E.R. 823.

As to delimitation of boundaries, see 3 Halsbury's Laws (3rd Edn.) 354 et seq.; as to jurisdiction regarding immovables abroad, see ibid., vol. 7, pp. 30 et seq.; as to defence, to actions for specific performance, see ibid., vol. 36, pp. 280 et seq. For cases see 7 Digest (Repl.) 267 et seq.; 11 Digest (Repl.) 369 et seq.; 44 Digest (Repl.) 29 et seq.

Cases referred to:

(1) *Reeve* v. *A.-G.* (1741), 2 Atk. 223; 26 E.R. 538; 11 Digest (Repl.) 592, *310.*

(2) *Duke of Buckingham's Case* (1569), 3 Dyer, 285 b.; Keilw. 170; Jenk. 236, case 14.

Bill for specific performance of articles of agreement regarding the boundaries of two provinces in America.

The articles entered into between the plaintiffs and the defendant on May 10, 1732, recited several matters as introductory to the stipulation between the parties,

and particularly letters patent granted on June 20, 1625, by which the district, property, and government of Maryland under certain restrictions was granted to the defendant's ancestor, his heirs and assigns. Further, there was recited charters or letters patent in 1681 by which the province of Pennsylvania was granted to William Penn and his heirs, and a title to the plaintiffs derived from James, Duke of York, to the three lower counties by two feoffments both bearing date Aug. 24, 1682. Several controversies had arisen between the parties concerning the boundaries and limits of these two provinces and three lower counties, and a provision was made for settling them by drawing part of a circle about the town of Newcastle, and a line to ascertain the boundaries between Maryland and the three lower counties, and a provision in what manner that circle and line should run and be drawn, and that commissioners should do it on or before Dec. 25, 1733. There was, besides, a provision in the articles that if there should be a want of a quorum of commissioners meeting at any time, the party by default of whose commissioners the articles could not be carried into execution should forfeit the penalty of £5,000 to the other party, and a provision for making conveyances of the several parts from one to the other in these boundaries and for enjoyment of the tenants and landholders.

The first objection for the defendant was that this court has no jurisdiction nor ought to take cognisance of the bill, for that the jurisdiction was in the King and Council. Secondly, it was argued that, if there was not an absolute defect of jurisdiction in this court, yet being a proprietary government and Feudary Seigniory held of the Crown, who had the sovereign dominion, the parties had no power to vary or settle the boundaries by their own act, for such an agreement to settle boundaries and to convey in consequence, amounted to an alienation, which the lords proprietors could not do. Supposing they might alienate entirely, they could not alienate a parcel, as that was dismembering, for which there was a rule in the feudal books concerning feudal indivisibilia. Thirdly, the agreement ought not to be carried into execution by this court as it affected, without their consent, the estates, rights and privileges of the planters, tenants and inhabitants within the district and the tenure and law by which they lived.

Fourthly it was argued, supposing all this answered, yet the agreement was not proper to be established from the general nature and circumstances. First, as it was merely voluntary, and the court never decreed specifically without a consideration. Secondly, as the time for performance was lapsed. Thirdly, that these articles were in the nature of a submission to arbitration which could not be supplied by interposition and act of this court. Fourthly, that the defendant was imposed on or surprised in making this agreement. Fifthly, that, if there was no imposition or fraud, the defendant grossly mistook his original right, and under that mistake and ignorance, the articles were founded and framed. Sixthly, the agreement in some material parts was so uncertain that it could not be decreed with certainty according to the intent of the parties, for no centre was fixed without which it was impossible to make a circle, nor was it sufficiently described whether it should be a circle with a radius of twelve miles or only a periphery of twelve miles. Seventhly, there was a covenant for mutual conveyances, whereas the plaintiffs had no estates in the lower counties so as to make an effectual conveyance to the defendant, and an agreement must be decreed entirely, or not at all, and on the plaintiffs' own showing the legal estate and property was in the Crown so that at most they had but an equitable right, in which the Crown was trustee and then this court could not decree a conveyance. In *Reeve* v. *A.-G.* (1), lands were devised to a wife, and after her death to be sold, and the money to be divided among the plaintiffs. The testator died without heirs, so the legal interest in the estate descended to the Crown, but with a trust to be sold. On a bill to have the will established and to hold against the Crown, or the lands sold, Lord Hardwicke, L.C., dismissed the bill and said that where the Crown was trustee, the court had no jurisdiction to decree a conveyance, but they must go to a petition of right.

Eighthly, this court could not make an effectual decree in the cause, nor enforce the execution of their own judgment.

Cur. adv. vult.

May 15, 1750. **LORD HARDWICKE, L.C.**—I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labour and ability of the argument on both sides, it being for the determination of the right and boundaries of two great provincial governments and three counties, and of a nature worthy the judicature of a Roman senate rather than of a single judge. My consolation is that if I should err in my judgment, there is a judicature equal in dignity to a Roman senate that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence which will fall in more naturally, and very intelligibly, under the particular points arising in the cause. The relief prayed must be admitted to be the common and ordinary equity dispensed by this court, the specific performance of agreements being one of the great heads of this court, and the most useful one, and better than damages at law, so far as relates to the thing in specie, and more useful in a case of this nature than in most others, because no damages in an action of covenant could be at all adequate to what is intended by the parties and to the utility to arise from this agreement, viz., the settling and fixing these boundaries in peace to prevent the disorder and mischief which in remote countries, distant from the seat of government, are most likely to happen, and most mischievous. Therefore, the remedy prayed by a specific performance is more necessary here than in other cases, provided it is proper in other respects, and the relief sought must prevail unless sufficient objections are shown by defendant who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered, and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in primo die, and answering, submits to the jurisdiction, much more when there is a proceeding to hearing on the merits which would be conclusive at common law, yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing will no more make a decree than where a plain want of equity appears. It is certain that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and Council, and it is rightly compared to the cases of the ancient commotes and Lordships Marchers in Wales in which, if a dispute is between private parties, it must be tried in the commotes or Lordships, but in those disputes, where neither had jurisdiction over the other, it must be tried by the King and Council and the King is to judge though he might be a party. This question often arising between the Crown and one Lord-Proprietor of a province in America, so in the case of the Marches it must be determined in the King's courts, who is never considered as partial in these cases, it being the judgment of his judges in the King's Bench and Chancery. So where before the King and Council, the King is to judge and is no more to be presumed partial in one case than in the other.

This court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries, and this bill does not stand in need of that. The plaintiffs' claim is founded on articles executed in England under seal for mutual consideration which gives jurisdiction to the King's courts both of law and equity whatever be the subject-matter. An action of covenant could be brought in the King's Bench or the Common Pleas if either side committed a breach, so might there be for the £5,000 penalty without going to the Council. There are several cases wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the court originally will be brought within it. Suppose an order by the King and Council in a cause wherein the King and Council had

original jurisdiction and the parties enter into an agreement under hand and seal for performance thereof. A bill must be in this court for a specific performance; and perhaps it will appear, this is almost literally that case. The reason is because none but a court of equity can decree that. The King in Council is the proper judge of the original right, and if the agreement was fairly entered into and signed, the King in Council might look on that, and allow it as evidence of the original right, but if that agreement is disputed, it is impossible for the King in Council to decree it as an agreement. That court cannot decree in personam in England unless in certain criminal matters, being restrained therefrom by the statute 16 Car. [1, c. 10, s. 3: Habeas Corpus Act, 1640; 4 HALSBURY'S STATUTES (2nd Edn.) 135], and, therefore, the lords of the Council have remitted this matter very properly to be determined in another place on the foot of the contract. The conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts in personam, the court may properly decree it as an agreement, if a foundation for it. To go a step further, as this court collaterally and in consequence of the agreement judges concerning matters not originally in the jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the ecclesiastical court, just as a court of law would maintain an action for damages in breach of covenant.

As to the second objection, if it was so, it would be very unfortunate, for suits and controversies might be for that reason endless. This has subsisted above seventy years. This objection is insisted on at the Bar, and not by the answer. The subordinate proprietors may agree, how they will hold their rights between themselves, and if a proper suit is before the King in Council on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves. In this respect also it is properly compared to the case of Lordships Marchers and to counties Palatine. When the Marches subsisted, there might be a suit in the King's Bench concerning their boundaries, and the lord of each March in question need be the only party. If a matter of equity arose, either of the Lordships Marches might have sued in equity to settle, because this is the King's court of general jurisdiction as to matters of equity, and an agreement between the parties relative to these boundaries, if proper in other respects to carry it into a specific performance, is a matter of equity. The court might, indeed, by reason of their tenure require the Attorney-General to be made a party, to know if he had anything to object, but then might hold plea of the cause. Suppose, both counties Palatine were in subject hands (as both have been formerly), and subsisted so, and a question had arisen concerning the boundaries of these two counties Palatine; and the respective earls Palatine had entered into articles concerning these boundaries, this court would have held plea of such articles as well as concerning the boundaries of manors, seigniories, and honours, for these are honours, only a franchise of a higher nature. To say that such a settlement of boundaries amounts to an alienation is not the true idea of it, for, if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits. But suppose it favours in some degree of an alienation, why ought it not to be? There is no occasion to determine that, nor will I, but it is a new notion that the lords proprietors of these provinces may not alienate to natural born subjects. This is no opinion, but the grants themselves are framed so as to be most open to alienation, being grants to them and their heirs to be held in common socage, not in capite of the Crown, but as Windsor Castle is. What rule of law is there that lands or a franchise granted to be held in common socage, not in capite, but as of a particular honour or manor, cannot be alienated without licence? All the objections concerning knight's service or capite lands are out of the case, and the Plantation Trade Act, 1695 [repealed by Statute Law Revision Act, 1867], s. 16, supposes, the proprietors may alienate to a natural born subject. The first words of the clause there are that they and their assigns may be restrained from alienating without licence, which supposes that it was assigned, and this appears in the case of Carolina. As

to the not alienating a parcel, the rule cited out of the Feudists is not applicable, those books treating of different tenures, but I admit that neither of these proprietors could dismember their provinces, so as to alter the nature of the thing granted and thereby bind the Crown, of whom they held for the tenure and services would still remain on the whole, and the Crown might demand the whole services from either. It is, therefore, something like the case of the office of High Constable of England, held by tenure of grand serjeanty, which was very extraordinary, to hold the manors by tenure of such an office. In *Duke of Buckingham's Case* (2), the judges reported their opinion to King Henry VIII that the tenure was not extinct by the division, but that the King had a right to insist on the performance of that office from the Duke of Buckingham by reason of his moiety. This exacting the performance of the service from either subject is at the King's pleasure to do or not. This is an instance that in honours and tenures of this kind, the King cannot be prejudiced by any alienation, division or severance between the parties, and if material services are reserved on the grant (though here it is by fealty only in lieu of all) the entire services might be exacted from either, not being apportionable. But the settling of limits is not a dismembering, and if a licence to do this was necessary from the Crown in law and policy, it sufficiently appears that there was such, for it appears by Orders of Council made in 1685 and 1709 that the Crown has not only recommended but has ordered this division to be made so far as respects the three lower counties, as to which there is no dismembering, for the dividing line is thereby exactly the same. Indeed, the circle is not within these orders, but as to that no difficulty can arise.

As to the third objection, the tenure of the planters, etc., remains just the same as before, and is preserved by this agreement. The proprietors could not prejudice them by their agreement, but, if they could, care is taken by the agreement to preserve them. The King of England is still their sovereign and supreme Lord. Both charters require that the law of the respective provinces should be conformable to the law of England as near as could be. Consider to what this objection goes. In lower instances, in the case of manors and honours in England, which frequently have different customs and byelaws, yet though different, the boundaries of these manors may be settled in suits between the lords of these manors without making the tenants parties, or may be settled by agreement, which this court will decree without making the tenants parties, though in case of fraud, collusion or prejudice to the tenants they will not be bound. Notwithstanding it is binding on the parties, and to be established as to them. Suppose, two bordering manors had been granted out in tail in recompense of services, the reversion in fee to the Crown. In a suit between the lords concerning the boundaries, it is not necessary to make the King or tenants parties to this suit. Indeed, the Crown would not be bound by that agreement or decree, but it is still binding between the parties. In this case the same final answer occurs that does under the other objection, viz., that, if there is no fraud or collusion, it must be presumed to be the true limits being made between parties in an adversary interest, each concerned to preserve his own limits, and no pecuniary or other compensation pretended. And (abstracted from the general question of want of jurisdiction) suppose that either party insisted that there was such a breach of the proviso here, as incurred the penalty, and brought debt in the King's Bench for that penalty, and the defendant brought a bill here to be relieved (which probably would have been done), the court must have relieved against the penalty on performance of the articles, judging on the terms of the relief and dispensing with the point of time, the court could not have avoided it. Then how does this case differ? For it will not be pretended that the King in Council would have had plea in that case. It must have come into the King's courts of equity, which must have judged of the manner of performing that agreement.

The next head of objection is taken from the general nature and circumstances of the agreement.

First, it is true that the court never decrees specifically without a consideration,

but this is not without consideration, for, though nothing valuable is given on the face of the articles as a consideration, the settling boundaries and peace and quiet, is a mutual consideration on each side, and in all cases make a consideration to support a suit in this court for performance of the agreement for settling the boundaries. The objection of the time for performance being lapsed may be answered, for it is the business of this court to relieve against lapse of time in performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance as it plainly does not here.

Next, these articles are not like a submission to arbitration. In those cases generally the time is conditional so as determination be made by such a day; here the line and circle are agreed on by distinct, independent, covenants, and that they shall form the boundaries of these tracts of land. This, therefore, is a particular, certain, specific contract of the parties, that these shall be the boundaries. Nothing is left to the judgment of the commissioners, who are merely ministerial to run the line, etc., according to the agreement, and set the marks. Therefore, it is not like an award, but is an agreement, which this court will see pursued. As to any imposition or surprise, the evidence is clearly contrary thereto. It would be unnecessary to enter into the particulars of that evidence, but it appears that the agreement was originally proposed by the defendant himself. He himself produced the map or plan afterward annexed to the articles; he himself reduced the heads of it into writing, and was very well assisted in making it. Further, there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, viz., the defect of evidence on the part of the defendant which amounts to stronger negative evidence than if it was by witnesses, for it was in his own power to have shown it, if otherwise. Then am I to presume he was imposed on, in a plan, too, sent to himself by his own agents. As to the plan itself, it was in his own power. With regard to the original of these minutes of the agreement wrote by himself, though ordered by the court to be produced, they are not produced, which negative evidence supports the evidence of the fairness of carrying on this agreement on the part of the plaintiffs.

I admit that, though no imposition or fraud, yet a plain mistake contrary to the intent would be a ground not to decree specific performance. But consider the evidence thereof. The defendant and his ancestors were conversant in this dispute about fifty years before this agreement was entered into, and had all opportunities; therefore, no ignorance, want of information or mistake, are to be presumed. In cases of this kind after an agreement and plain mistake contrary to intent of parties not shown, it is not necessary for the court to resort to the original right of the parties: it is sufficient, if doubtful. To consider the points in dispute, and first upon the defendant's charter in which it is insisted that the whole 40th degree of north latitude is included. If so, that it is not to be limited by any recital in the preamble. There is great foundation to say that the computations of latitude at the time of the grant vary much from what they are at present, and that they were set much lower anciently than what they are now, as appears by Mr. Smith's book, which is of reputation, but I do not rely on that for the fact is certainly so. Whatever that was, does it take it in by the description? It comes to the question whether the usque ad is inclusive or exclusive. Therefore, however described, the same question remains.

There is another argument used by the plaintiffs to restrain the defendant's charter from taking in the whole 10th degree, viz., the recital of it, for the plaintiffs say, that the information given to the Crown by Lord Baltimore, was that this part was land uncultivated and possessed by barbarians, whereas it was not so, but was possessed by Dutch and Swedes, and, therefore, the King was deceived in his grant. There is considerable evidence that Dutch and Swedes were settled on the east part of that country, but this is said to be no deceit on the Crown, for though some stragglers were settled there, yet, if not recognised by the Crown, that is not a settlement. I am of a different opinion, for in these countries it has

A been always taken that that European country which has first set up marks of possession has gained the right, though not formed into a regular colony, and that is very reasonable on the arguments on which they proceeded. Will not that affect the grant? If the fact was so, that would be as great deceit on the Crown in notion of law as any other matter arising from the information of the party because such grants tend to involve the Crown in wars and disputes with other B nations, nor can there be a greater deceit than a misrepresentation tending to such a consequence which would be a ground to repeal the letters patent by scire facias.

Next consider the dispute on Penn's charter which grants to him all that track of land in America from twelve miles distance from Newcastle, to the 43rd degree of north latitude, etc., under which the plaintiffs do not pretend a title to the three lower counties, which relate to the two feoffments in 1682. Upon the charter C it is clear by the proof that the true situation of Cape Henlopen is as it is marked in the plan, and not where Cape Cornelius is as the defendant insists which would leave out a great part of what was intended to be included in the grant, and there is strong evidence of seisin and possession by Penn of that spot of Cape Henlopen and all acts of ownership. But the result of all the evidence, taking it in the most favourable light for the defendant, amounts to make the boundaries of these coun- D tries and rights of the parties doubtful. Senex, who was a good geographer, says that the degrees of latitude cannot be computed with the exactness of two or three miles, and another geographer says that with the best instruments it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles which is near the whole extent between the two capes. It is, therefore, doubtful, and the most proper case for an agreement, which being entered into, E the parties could not resort back to the original rights between them, for, if so, no agreements can stand, whereas an agreement, entered into fairly and without surprise, ought to be encouraged by a court of justice.

The objection of uncertainty arises principally on the question concerning the circle of twelve miles to be drawn about Newcastle. It was insisted on in the answer, and greatly relied on in America, but is the clearest part of the cause. F As to the centre, it is said, that Newcastle is a long town, and, therefore, it not being fixed by the articles, it is impossible that the court can decree it, but there is no difficulty in it. The centre of a circle must be a mathematical point (otherwise it is indefinite) and no town can be so. I take all these sort of expressions and such agreements to imply a negative; to be a circle at such a distance from Newcastle and in no part to be further. Then it must be no further distant from G any part of Newcastle. Thus to fix a centre, the middle of Newcastle, as near as can be computed must be found and a circle described round that town. This is the fairest way, for otherwise it might be fourteen miles in some parts of it if it is a long town. What must be the extent of the circle? It is given up at the Bar, though not in the answer. It cannot be twelve miles distant from Newcastle unless it has a semi-diameter of twelve miles, but there is one argument decisive without H entering into nice mathematical questions. The line to be the dividing line and to be drawn north from Henlopen, was either to be a tangent or intersecting from that circle, and if the radius was to be of two miles only it would neither touch nor intersect it, but go wide. There is no difference as to the place or running of the line from south to north, though there is as the cape from which it is to commence.

I As to the seventh head of this objection, it is truly said that agreements must be decreed entire, or not at all. As to the plaintiff's estate and possession, this must concern only the three lower counties, which plainly passed by the feoffment. I will lay aside the question of estoppel which is a nice consideration, for the Duke of York, being then in nature of a common person, was in a condition to be estopped by a proper instrument. In 1683 the Duke of York takes a new grant from the Crown, and, having granted before, was bound to make further assurance, for the improvements made by Penn were a foundation to support a bill in equity for further assurance. The Duke of York, therefore, while a subject was to be

considered as a trustee. Why not afterward as a royal trustee? I will not decree A
that in this court, nor is it necessary, but it is a notion established in courts of
revenue by modern decisions that the King may be a royal trustee, and if the
person from whom the King takes by descent was a trustee, there may be grounds
in equity to support that. If King James II, after coming to the Crown, was a
royal trustee, his successors take the legal estate under the same equity; and it is
sufficient for plaintiffs if they have an equitable estate. Consider this in point of B
possession of the Penns, the proof of which is very clear. They have been permitted
to appoint governors of these lower counties which have been approved by the
Crown according to the statute of King William. Indeed, all the acts of possession
are with salvo jure to the Crown, but the evidence for the defendant amounts to
this, not of a real possession or enjoyment, but of attempts to take possession
sometimes by force, sometimes to inciting people to come there. Otherwise why C
should Lord Baltimore grant here for half what he granted in other places, which
shows plainly it was an invitation to get settlers there under their title? I am
of opinion that full and actual possession is sufficient title to maintain a suit for
settling boundaries. A strict title is never entered into in cases of this kind,
neither ought it. But what ends this point of want of title to convey is that no
part of the lower counties is left to be conveyed by the plaintiffs to the defendant, D
so that, nothing being to pass by the plaintiffs, it is not material whether they have
title to convey or not. In cases of this kind, of two great territories held of the
Crown, I will say once for all that long possession and enjoyment, peopling, and
cultivating countries, is one of the best evidence of title to lands, or district of
lands in America, that can be, and so have I thought in all cases since I have
served the Crown, for the great beneficial advantages, arising to the Crown from E
settling, etc., is that the navigation and the commerce of this country is thereby
improved. Those persons, therefore, who make these settlements ought to be
protected in the possession as far as law and equity can, and both these proprietors
appear to have great merit with regard to the Crown and the public, for these two
provinces have been improved in private families to a great degree to the advan-
tage of their mother country. This regards the three lower countries, the strength F
of which is vastly on the side of the plaintiffs.

As to the court's not enforcing the execution of their judgment, if they could
not at all, I agree that it would be in vain to make a decree, and that the court
cannot enforce their own decree in rem in the present case, but that is not an
objection against making a decree in the cause, for the strict primary decree in
this court as a court of equity is in personam, long before it was settled whether this G
court could issue to put into possession in a suit of lands in England, which was first
begun and settled in the time of James 1, but ever since done by injunction or writ of
assistant to the sheriff, but the court cannot to this day as to lands in Ireland or the
plantations. In Lord King's time [1725–33] in *Richardson* v. *Hamilton*, *Attorney-
General of Pennsylvania*, which was a suit of land and a house in the town of
Philadelphia, the court made a decree, though it could not be enforced in rem. H
In the case of Lord Anglesey of land lying in Ireland, I decreed for distinguishing
and settling the parts of the estate, though impossible to enforce that decree in
rem, but, the party being in England, I could enforce it by process of contempt
in personam and sequestration, which is the proper jurisdiction of this court.
In the present case, if the parties want more to be done, they must resort to another
jurisdiction and it looks by the order in 1735, as if that was in view, liberty being I
thereby given to resort to that board.

This opens a way to that part of the case relating to the Crown. The Attorney-
General acts a very impartial part, and I shall express in the fullest words that this
decree is entirely without prejudice to any prerogative, right, or interest in the
Crown. I will go further, that, as I do not know how far that interest of the Crown
may be, I will reserve liberty for either party to apply to this court if by any act
or right of the Crown execution of this shall be obstructed, for the court is at liberty
to suspend its decree if a difficulty to perform it is shown. I will reserve further

directions as between the parties as to that matter so de novo arising. Judgments have been at law with a salvo jure of the Crown, as in Rastal and Coke's entries in the title of intrusion and quo warranto, which, particularly in the cases of lands relating to intrusion, is very analogous to the present. I am of opinion, therefore to decree a specific performance of this agreement without prejudice to any rights of the Crown. [His Lordship made an order for costs in the plaintiff's favour.]

THOMAS *v.* SORREL

[Court of Exchequer Chamber (Sir Matthew Hale, C.J., Twisden, Wilde and Rainsford, JJ., Vaughan, C.J., Atkyns, Wyndham and Ellis, JJ., Turnour, C.B., Thurland, Turnor and Littleton, BB.), Trinity Term, 1673]

[Reported Vaugh. 330; 1 Lev. 217; 1 Freem.K.B. 85, 137; 3 Keb. 264; 124 E.R. 1098]

Crown—Grant—Exemption to sell wine without licence—Effect of death of Sovereign.

King James I granted by patent to the Vintners of London liberty to sell wines without licence.

Held: the patent did not determine by the King's death.

Notes. The statute 12 Car. 2, c. 25 (Wine) (1660) was repealed by S.L.R. 1863, and the statute 7 Edw. 6, c. 5 (Wines) (1553) was repealed by 19 & 20 Vict., c. 64 (Repeal of Obsolete Statutes) (1856). The Vintners of the City of London are now exempted by s. 199 (b) of the Licensing Act, 1964 (44 Halsbury' Statutes (2nd Edn.) 642).

This case was decided before the passing of the Bill of Rights (1688) (4 Halsbury's Statutes (2nd Edn.) 151) which declared "That the pretended power of suspending of laws or the execution of laws by regal authority without the consent of Parliament is illegal."

As to limitations of royal prerogative, see 7 Halsbury's Laws (3rd Edn.) 229 et seq.; and for cases see 11 Digest (Repl.) 567 et seq. As to special rights of Vintners' Company, see 9 Halsbury's Laws (3rd Edn.) 106. As to exemption of the Vintners' Company to sell wine without licence, see 22 Halsbury's Laws (3rd Edn.) 521; and for cases see 30 Digest (Repl.) 10.

Claim for Debt for £450 arising under the statute 12 Car. 2, c. 25 (Wine) (1660) for selling wines without licence. The plaintiff claimed that the defendant at fifty several times had sold wine in his house, being a tavern, without being licensed according to the statute 12 Car. 2, c. 25, for which he forfeited £5 for each time. The defendant pleaded nil debet.

On a special verdict the jury found the following: That under the statute 7 Edw. 6, c. 5 (Wines) (1553) touching the selling of wines, that none should sell without licence according to that Act. Proof of the patent of 9 Jac. 1 (1611) whereby the King incorporated the Vintners of London and granted for himself, his heirs and successors, that it should be lawful to the master, wardens and freemen of the Commonalty of Vintners (that being the name of the corporation) and successors and all who should be free of the said company, to sell wine. First, within London and three miles thereof; secondly, in all cities and port-towns in England; thirdly, in all other cities and thoroughfare-towns on the road, between London and Dover and London and Berwick, where any of the company should inhabit, and to keep taverns and sell wines by retail, notwithstanding the statute

7 Edw. 6, c. 5, or any other statute made or to be made. That the statute 12 Car. 2, c. 25, enacted that "no person shall sell wines by retail, except he be enabled according to that statute"; and that it directed how the King should nominate commissioners for granting the licences and thereupon reserved a revenue to the King:

"Provided that this Act shall not be prejudicial to the master, wardens, freemen and commonalty of the Vintners of London, but that they may use and enjoy such liberties, as they have hithertofore lawfully used."

The defendant was a freeman of the Vintners Company, and kept a tavern at Stepney, within three miles of London, and sold wine by retail at the said times. If he were indebted for the said times, the jury found for the plaintiff £50; if not, then for the defendant.

This case after many arguments in the King's Bench was because of its weight and difficulty adjourned into the Exchequer Chamber where it was twice argued at the Bar. The points which arose for consideration were: (i) whether or not the patent of 9 Jac. 1, was void in its creation; (ii) admitting it was not void in creation, whether it became void by the death of King James I; (iii) if a good patent and not void by the death of King James I, whether the proviso to 12 Car. 2, c. 25, preserved the rights which the Vintners Company had under the patent against the Act of 12 Car. 2, c. 25, so as to enable the defendant to sell wine without licence.

North, the King's Solicitor and (after his appointment as a judge) *Finch*, the King's Attorney, for the plaintiff.

Levinz for the defendant.

Per Curiam: As to the first point, Sir Matthew Hale, C.J., Vaughan, C.J., Twisden, Wilde, Rainsford and Atkyns, JJ., Turner [Turnor] and Littleton, BB. (Thurland, B., Wyndham and Ellis, JJ., and Turner (Turnour], C.B., dissenting), held that the patent was good in its creation.

As to the second point, Wyndham and Ellis, JJ. (Sir Matthew Hale, C.J., Vaughan, C.J., Twisden, Wilde, Rainsford and Atkyns, JJ., Turner [Turnor] and Littleton, BB., concurring), held that, if the patent was ever good, it did not determine by King James's death. But Turner [Turnour], C.B., and Thurland, B., held that, though the patent had been good in its creation, it was notwithstandingly determined by the King's death.

As to the third point, all the judges (Thurland, B., alone dissenting) agreed that the proviso in the statute 12 Car. 2, c. 25, exempted the vintners of London out of the statute, because it was a privilege lawfully used by them before the statute.

Thereupon the record was sent back to the King's Bench and on a motion of counsel for the defendant, judgment was entered accordingly.

Judgment for defendant.

LANE *v.* COTTON

[Court of King's Bench (Sir John Holt, C.J., Turton, Powys and Gould, JJ.), Easter Term, 1701]

[Reported 12 Mod. 472; 1 Com. 100; 1 Ld. Raym. 646; 11 Mod. 12; Carth. 487; Holt, K.B. 582; 5 Mod. 455; 1 Salk. 17; 88 E.R. 1458]

Crown—Crown servant—Liability for acts of subordinates.

A servant of the Crown is not liable for the acts of his subordinates. Accordingly, the Postmaster-General **held** not to be responsible for the loss of a postal packet through the negligence of his subordinates.

Statute—Construction—Inclusion of things created since passing of Act—Creation of new office—Liability of holder—Liability of holders of comparable offices.

Where on its proper construction a statute can be held to apply to newly created things which were not in existence when it was passed the language of the statute will be so tended to include them. Where an Act creates a new office for the benefit of the public with incidents comparable with those of other offices the holders of which are liable for the default of their servants it must be presumed that the holder of the new office is similarly liable.

Carriage of Goods—Common carrier—Duty to carry goods safely—Right to refuse goods—Goods brought unreasonable time before start of journey.

Inn—Innkeeper—Duty to receive guests into inn.

A common carrier exercises a public employment, and just as an innkeeper is bound to receive guests into his inn if he has no lawful excuse so a common carrier is bound to accept goods offered to him for carriage if he has no lawful excuse, and he is liable for their loss. One such excuse is if the goods are brought to his place of departure an unreasonable time before he is to start on his journey.

Public Employment—Liability of holder of office.

Per Sir John Holt, C.J.: Wherever a man takes upon himself an office of trust the exercise of which is for the benefit and advantage of the public, and takes a reward for the same, he is bound to serve the subject in all things within the reach and comprehension of such an office under pain of an action against him, and he shall be answerable at law for any harm the subjects receive by his ill administration of that office or employment and for all events and chances, even from thieves and like malefactors.

Notes. Followed: *Whitfield* v. *Le Despencer* (1778), 2 Cowp. 754. Distinguished: *Nicholson* v. *Mouncey* (1812), 15 East, 384. Explained: *Woods* v. *Finnis* (1852), 16 Jur. 936. Considered: *Mersey Docks and Harbour Board Trustees* v. *Gibbs*, [1861–73] All E.R.Rep. 397; *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178; *Triefus & Co.* v. *Post Office*, [1957] 2 All E.R. 387. Referred to: *Jones* v. *Hart* (1697), 2 Salk. 441; *Perkins* v. *Smith* (1752), Say. 40; *Laugher* v. *Pointer*, [1824–34] All E.R.Rep. 388; *Duncan* v. *Findlater* (1839), 6 Cl. & Fin. 894; *R.* v. *Gibbs* (1855), 6 Cox, C.C. 455; *Hearn* v. *London and South Western Rail. Co.* (1855), 24 L.J.Ex. 180; *R.* v. *Kay* (1857), 26 L.J.M.C. 119; *Bennett* v. *Bayes* (1860), 5 H. & N. 391; *R.* v. *Treasury Lords Comrs.* (1872), 41 L.J.Q.B. 178; *Clarke* v. *West Ham Corpn.*, [1909] 2 K.B. 858; *Bamfield* v. *Goole and Sheffield Transport Co.*, [1908–10] All E.R.Rep. 799; *Great Northern Rail. Co.* v. *L.E.P. Transport and Depository, Ltd.*, [1922] All E.R.Rep. 18.

As to the liability of Crown and public servants, the construction of statutes, and the duties of carriers and innkeepers, see 30 Halsbury's Laws (3rd Edn.) 701–706; vol. 36, pp. 382 et seq.; vol. 4, pp. 137 et seq.; vol. 21, pp. 445 et seq. For cases see 38 Digest (Repl.) 52 et seq.; 44 Digest (Repl.) 197 et seq.: 8 Digest (Repl.) 12 et seq.; 29 Digest (Repl.) 6 et seq.

Cases referred to: A

(1) *Gelley* v. *Clerk* (1607), Cro. Jac. 188; Noy, 126; 4 Bac. Abr. 448; 79 E.R. 164; 29 Digest (Repl.) 5, *43*.

(2) *Rich* v. *Kneeland* (1613), Cro. Jac. 330; Hob. 17; 79 E.R. 282, Ex. Ch.; 8 Digest (Repl.) 169, *1096*.

(3) *Mors* v. *Slew* (1672), 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Mod. Rep. 85; T.Raym. 220; 1 Vent. 190, 238; 84 E.R. 548, 601, 624, 638; B 8 Digest (Repl.) 20, *106*.

(4) *Herbert* v. *Paget* (1662), 1 Keb. 288; 1 Sid. 77; 1 Lev. 64; 83 E.R. 95; 38 Digest (Repl.) 63, *379*.

(5) *Anon.* (1502), Keil. 50; 72 E.R. 208; 29 Digest (Repl.) 9, *106*.

(6) *White's Case* (1558), 2 Dyer, 158 b; 73 E.R. 343; sub nom. *Bird* v. *Bird*, 1 And. 29; Ben. 60; sub nom. *Byrd* v. *Byrd*, Benl. 18; 29 Digest (Repl.) 4, C *30*.

(7) *R.* v. *Collins* (1623), Palm. 373; 81 E.R. 1130; sub nom. *Anon.*, Godb. 345; Palm. 367, 2 Roll. Rep. 345; 29 Digest (Repl.) 6, *47*.

(8) *Palmer* v. *Porter* (1596), Moore, K.B. 431; sub nom. *Palmer* v. *Potter*, Cro. Eliz. 512; 78 E.R. 761; 41 Digest (Repl.) 93, *198*.

(9) *Southcote's Case* (1601), 4 Co. Rep. 83 b; 76 E.R. 1061; sub nom. *Southcot* v. D *Bennet*, Cro. Eliz. 815; 29 Digest (Repl.) 12, *143*.

(10) *Marsh* v. *Astry* (1590), Cro. Eliz. 175; 1 Leon. 146; 78 E.R. 432; 41 Digest (Repl.) 89, *136*.

(11) *Baldry* v. *Johnson* (1600), Cro. Eliz. 743.

(12) *Barrett* v. *Winscombe* (1614), 1 Roll. Rep. 78; 81 E.R. 340.

(13) *Laycock* v. *Under-Sheriff of Wilts.* (1650), Noy, 90. E

(14) *Norton* v. *Simmes* (1614), Hob. 12; Moore K.B. 856; 80 E.R. 163; 41 Digest (Repl.) 79, *33*.

Action against the Postmaster-General, Sir Robert Cotton, for the loss of exchequer bills delivered to the post office for transmission.

The plaintiff said that he, being possessed of eight exchequer bills in London did enclose them in a letter directed to one Jones, a goldsmith in Worcester, and F delivered the letter with the bills so enclosed to one B., an officer under the defendant, whose duty it was to take in and deliver out letters at the office in London to be sent according to the direction. The plaintiff alleged that the said letter, being so delivered to B. was taken out of the office at London by an unknown hand, and lost.

The question was whether an action lay against the Postmaster or not. After G argument by counsel,

TURTON, POWYS, and **GOULD, JJ.,** were of opinion that the action did not lie against the defendant, because this was not like common law offices, in which the superior answered for the inferiors as his servants, but this was an office newly created by Act of Parliament. H

GOULD, J., called it founded in government, that is, in which each had a distinct branch to exercise, yet with subordination and dependency on the chief master; not as servants, but by the very constitution and erection of the office; and this by Act of Parliament to which everyone was consenting. He said that every one of these, in his own peculiar station, was as much an officer pro tempore I as the master, and compared it with a corporation in which the head was over the rest, yet not answerable for the miscarriage of an inferior member.

TURTON and GOULD, JJ., agreed that exchequer bills were not things proper to be sent by post.

POWYS, J., held that there were sufficient words in the Act to comprehend exchequer bills.

SIR JOHN HOLT, C.J.: Notwithstanding what has been said by counsel and by

my three brothers on the Bench, I am of opinion that the plaintiff ought to have judgment.

This case is comprehended in a narrow compass. Before I give my reasons, it will be proper to observe upon what points I go and insist on. It is to be considered that it is no part of the question here whether, if a letter is put into the post and sent safely out, and the mail on the road is robbed, or some other mischance happens whereby the letter is lost, whether, I say, the Postmaster be liable in that case is not the question now, for that is merely foreign and deserves a separate consideration. But as this case stands now before us, where a letter is delivered to the proper officer in his office in London and there lost in the very office, although no diversity has been taken between these two cases, either at the Bar or on the Bench, yet I think them different. There is reason the master should answer for the miscarriage of any letter or packet that is lost in the office, although not actually delivered to him, but to his servant, because by the constitution of the office he is entrusted with the profit and interest of the subject, and a trust is reposed in him, for the discharge of which he has a certain duty or salary. He is made a public officer by Act of Parliament "that there shall be one general Postmaster," and it is plain the statute designed this for the benefit of the subject, as appears by the preamble thereof. This was a matter of general concern for trade and commerce, and to the end that speed and safe dispatch should be had of letters and packets which, in the judgment of Parliament, was more likely to be had by making one general office and officer, so it appears to have been done for the more benefit and safety of the subject. Secondly, this office is fixed at London, which is the centre of business, from which all letters are sent and to which all letters are to come, so there is a certain place settled where this office is to be. Thirdly, it is an office of care, and that care is committed to the Postmaster, that none but he, his deputy or servant, etc., is to take, receive, or send any letter, except such as may be sent by the carrier, coach, etc., as the Act directs. So there is one man set up, and all the rest to be his deputies or servants, so that, from the nature of the trust, he is bound to keep safely in his office all letters and packets delivered in there at his peril, because it is a trust reposed in him by Act of Parliament, that is, by law.

This office is not at all distinguishable from that of marshal of this court or of Warden of the Fleet, who are entrusted with such offices by common law, and it is no excuse for them to say that their prisons were opened by unknown persons, although it be by people in open rebellion, as in the case of the Duke of Norfolk in 1444. The reason is because it is a trust by law in a public officer, and it being done under a government in which it is supposed he may have a remedy over, at least such remedy as the law allows, though the wrong was by persons in open rebellion, and there it was held that debt lay against the gaolers for such an escape upon the statute of 2 Rich. 2 [St. 2, 1378, relating to riots, etc.]. This was the case at common law, where a capias only lay for damages in trespass, but not for any action of debt, until the statute of 25 Edw. 3, c. 17 [St. 5, 1351] : see 3 Co. Rep. at p. 12. On this subsequent Act, which gives capias in debt upon a judgment in it, if the sheriff suffer one in execution on such capias to escape, debt will lie against him for it, though at common law, which made sheriff liable for escape where capias then lay, no such process as a capias on a judgment in debt was known, and he is as much bound to keep those that are in for debt since that statute as those who were in for damages in trespass before, and so is the law upon a levari facias. By the Statute of Westminster the Second, c. 18, an elegit is given, and if sheriff take goods upon an elegit, he shall be liable to answer for them if they are rescued, as if they had been taken upon the common law process of levari facias. Upon the statute of 13 Edw. 1 [St. 3, 1285], De Mercatoribus, the sheriff is liable for goods which he takes in execution by extendi facias, by consequence of law merely, for such a thing was not before that statute. What difference can be made between the marshal of this court and warden of the Fleet and this officer, for the master is to keep the letters safe until he sends them,

as the gaoler is to keep his prisoners until they are legally discharged out of his custody? A

Another reason why the master should be liable here is because the subjects pay a reward for keeping and sending away their letters, and this reward is paid to one who makes it his business and employment to take and send letters and packets delivered to him, and wherever a man takes upon himself an office, the exercise whereof is for the benefit and advantage of the public, and takes a reward for the same, he shall be answerable at law for any harm the subjects receive by his ill-administration of that office or employment, and for all events and chances, even from thieves and like malefactors: *Gelley* v. *Clerk* (1). If goods are left with an innkeeper by one who is no guest or traveller and they are lost, he shall not answer for them, because he has no benefit for the keeping and it is not his employment to keep such, but if a horse is left in his stable, and he is lost, he shall answer for it, because he receives profit thereby, arising from the meat consumed by the horse. And *Rich* v. *Kneeland* (2) (Hob. 17) in the action against the hoyman, which is the first of the kind to be met with in the books, is upon that reason, because he had a hire for it. B C

Gould, J., says this is an office founded in government. If he means that it is an office created and framed by law, he ought to make a quite contrary conclusion, for so is the office of a marshall and yet he shall answer for escapes, and should not it be so too in case of an officer created by Act of Parliament, for the one and the other are by law, the one and the other for the benefit of the subject? In the one case, the prisoners to be kept for their benefit to have their debts paid; in the other, that their letters be safely kept and sent away with speed. Why then should the officer in one case be answerable to the subject for his neglect or default and not in the other? Since he is entrusted with this office for the benefit and advantage of the subject, whatever consequential damage befalls the subject through his neglect, he ought to answer for it. Another reason of Gould, J., against the action was that if it did lie, it must be upon a contract express or implied. Truly I do not think that, but that he is chargeable by the law and the nature of his office. D E F

Another objection was that the reward does not go to the defendant. Whoever gives a reward to have a thing done for him ought to have a remedy if the thing is not done, and when a reward is given to an officer of public trust, that entitles the party to a remedy if he is grieved through neglect or other default of such officer, and if he ought to have such remedy, surely it must be against him who received his reward. Is £1,500 a year so small a premium as not to encourage those that enjoy it to be more diligent in the execution of their office, so at least as to suffer no neglect within the very walls of the office, as it was here? Although all the salary or revenue of the office does not go to the defendant, yet his salary is to be paid out of the revenue of the office. And there is no diversity between this case and *Mors* v. *Slew* (3), which was thus. Goods to be transported to foreign parts were shipped in the River Thames, and there were a competent number of men on board for sailing the ship, but they were in the river overpowered and robbed. The question was whether an action would lie against the master of the ship, and at a trial at Bar the special matter was found, and in arrest of judgment this very exception was taken to excuse the master, that he did not receive the hire, but the owners did, and the master had only a salary from them. But it was resolved against him, (i) because he was a public officer; (ii) because his salary was part of the hire, and did arise for the care and diligence that ought to be taken for the safe custody of the goods. So here the Postmaster is a public officer, and he has a salary from the profits of the office. My brothers have taken a difference between the two cases for that in the case of the master of a ship he might have taken precaution which the Postmaster cannot use. But what caution could there be used in one case and not in the other? It is true it is said in that case that, if the owners of the goods had brought them before such time as was convenient before the ship was ready to sail, he might refuse to receive them, and G H I

A that may be, and it is so in the case of a carrier. If goods are brought to his inn before the convenient time for him to be gone, he may refuse to take them, but in both cases, if one whom they entrust to receive goods before such convenient time receives goods and they are lost, the carrier shall answer for them, and so shall the master.

No man shall by law justify to deny the duty of his office, for there is a per-
B petual obligation upon them to keep the things to them committed, until they have discharged their trust, and when they have done, and no sooner, are they discharged. This case is within the same reason of justice and equity of law upon which all actions of this nature are brought, and it has all the ingredients whereby one is made responsible in like cases for the negligent keeping of goods, for what is the reason that a carrier or innkeeper is bound to keep such goods
C as he receives at his peril? It is grounded upon great equity and justice, for if they were not chargeable for loss of goods without assigning any particular default in them, they, having such opportunity as they have by the trust reposed in them to cheat all people, would be so apt to play the rogue and cheat people, without almost a possibility of redress by reason of the difficulty of proving a default particularly in them, that the inconvenience would be very great. Although one
D may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes, yet the inconvenience would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party, and the law will not expose him to so great a temptation, but he must be honest at his peril. This is the
E reason of the civil law in this case, which, though I am loath to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman empire, it must be owned that the principles of our law are borrowed from the civil law and, therefore, grounded upon the same reason in many things. All this may be, though the common law be time out of mind. It is to be doubted that there was intelli-
F gence given here that there were exchequer bills in this letter, otherwise it is improbable this letter should be singled out from all the rest. I do not here arraign the integrity of the gentlemen that manage the office, but we must consider the whole mass of mankind, and, although these are worthy persons, yet bad may succeed them who may search and open men's letters and none be the wiser or able to fix it upon them, being transacted in their own office, and lying
G only in the offender's privity, who thus may with impunity abuse the trust reposed in him. A common carrier, or innkeeper, or master of a ship, must have answered.

In *Mors* v. *Slew* (3), it appeared that the defendant was guilty of no particular default, for a power came upon him and robbed him, but surely more care might have been taken in this case, for if Breese had done his duty, the bill could not have been taken out of the letter in the office. The diversity between the
H case of a common carrier and this, upon account of the carrier's having a remedy against the hundred if he be robbed, it is none at all in the reason of the thing, for before that remedy was given, which was only by the Statute of Winchester [Stat. Wynton, 13 Edw. 1, St. 2: 1285] the action did lie against him, and yet he had no remedy but against the robbers if he could catch them, and the master has the like remedy here. Even now they are without remedy in some cases
I upon the Statute of Stannaries, other than against the thief or wrongdoer. As to the case of an innkeeper, this diversity is offered between it and this, for that it is within his house, which is his castle, and he may make his servants watch all night, but surely they do not consider that these bills were lost within the walls of the office in Lombard Street, which is likewise the defendant's castle and that he may keep his servants up all night if he pleases. The care in keeping up his servants to watch, if notwithstanding that a misfortune should happen, ought rather to discharge than to charge him and, therefore, no more reason the one should be bound than the other. The case of the innkeeper is a much stronger

case, for he is bound to receive all manner of people into his house until it be full, but the Postmaster need let none into his office but such as he pleases.

As to *Herbert* v. *Paget* (4), an action brought against the defendant for suffering an erasure to be made in a record in his custody, and it was thought prima facie the action lay, but on better consideration, inasmuch as it appeared that he had not the sole custody of the records, but that strangers of right had access to them without his permission, the plaintiff was barred. Here, however, the Postmaster had the sole custody, and nobody had liberty to come into the office without his leave. I am apprehensive here that some may think I would carry this point further than I have already declared, by comparing it to the carrier's case, and that by the same reason an action would lie if the letter had been lost upon the road. But I do not mean any such thing, for I would not give any opinion either the one way or the other in that case, for it is a thing that probably may come in question hereafter, but let that be as it will, there is a difference between that case and the present for the carrier receives the goods to carry safely and the Postmaster the letter to send safely, and those are the words of the Act; and I wonder no diversity has been taken between the case of a letter lost in the office and lost on the road, being sent safe out of the office, for there seems to be a great deal of difference. It may be a question upon the words of the statute whether when the master sends the letter safely away he is not discharged. Suppose he was not chargeable in case of a robbery on the road, it will not follow thence that he is not bound to keep a letter safe in the office. In *Mors* v. *Slew* (3), if the ship had been robbed at sea, the master would not have been answerable, yet he was chargeable at land, so here, although the Postmaster may not be chargeable for a robbery on the road, he may for a loss in the office. If a man brings a horse to an inn, and desires the master to put him into a stable until it cools and then sends him to grass, and if the horse is stolen before he sends him to grass, he shall answer for him, although if he had sent him to grass pursuant to the owner's desire, he would not be answerable. So, he shall be chargeable until he has performed the trust reposed in him, and as soon as he has performed it he shall be discharged. So here, perhaps, if the letter had been sent away safe out of the office, the Postmaster would have performed his trust and would have been discharged; yet it will lie as the case is where he has not performed his trust by safely sending it out.

By the duty of his office he is to take exchequer bills, although this has been denied by counsel, but it is his duty to receive them for these reasons: (i) by the words of the Act he is to receive any "letter, packet, or thing proper to be sent by post"; (ii) this is a thing proper to be sent by post. As to (i), wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office under pain of an action against him; and for that see KEILWAY 50 [*Anon.* (5)]. If on the road a shoe falls off my horse, and I come to a smith to have one put on, and the smith refuses to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade: KEILWAY, 50, pl. 4 [*Anon.* (5)]. If an innkeeper refuses to entertain a guest where his house is not full, an action will lie against him (*White's Case* (6); *Anon.* (7)), and so against a carrier, if his horses are not loaded, and he refuses to take a packet proper to be sent by a carrier, and I have known such actions maintained, although the cases are not reported. Why should not an action lie against a Postmaster here, if he should refuse to take in a letter, or any other thing proper to be sent by post? Doubtless an action would lie in that case. If the inn is full, or the carrier's horses laden, the action would not lie for such refusal, but one that has made profession of a public employment is bound to the utmost extent of that employment to serve the public. Surely, then, where it is a public employment created by law, the obligation is the greater, as if the sheriff refuses a

writ, an action will lie against him (*Palmer* v. *Porter* (8), Moore, K.B. at p. 432), because the law charges him with an employment for the convenience and good of the public. So here the law, viz., an Act of Parliament, charges the Postmaster with an employment for the good and convenience of the public. Therefore, the reason is the same. As to (ii), these exchequer bills are proper to be sent by the post, for the Act does not confine what things are to be sent, but leaves it very general. It does not mention any species, but says "any letter or packet whatsoever." It is plain that the Act meant other things than letters or packets of letters should be sent, for the prices are different. There is so much a sheet for letters, and so much an ounce for other things, as packets of writs, deeds, or other things, which words are as general as may be. So the prices are varied from that for letters and anything whatsoever that may be sent by post. All things which by their nature may be sent with dispatch, and without danger of hurting the horses, are proper to be sent by post, of what nature soever they be, and nothing can be more portable than exchequer bills, for a small packet of them may contain to the value of £10,000.

It is objected that they ought not to be sent by post, because they are new things, created long after the Act for erecting the Post Office. Answer: They are within the reason of other things which were in esse, and within the Act when it was made, 4 Co. Rep. 4, a, b. No agreement made before or after marriage barred a woman of her dower, although she accepted what was agreed on after the death of the husband; but the Statute of Uses, 1535 [repealed by Law of Property Act, 1925] makes estates for life of the wife, to take immediately after the death of her husband, to be a bar of dower, if it be made in satisfaction of her dower. At the time of making that Act, no land of freehold or inheritance was devisable but by special custom, and after by the statute of 32 Hen. 8 [? c. 1, relating to wills: repealed by Wills Act, 1837] they are made devisable. If such husband, whose wife is entitled to dower, devises land to her in satisfaction of dower and she accepts of it after his death, although it be a thing not known or in esse at the time of making the Statute of Uses, that makes a jointure a bar of dower, yet, being within the same reason with other jointures mentioned in that statute, it is judged to be a jointure within it. By the same reason, if exchequer bills be as proper to be sent by post as other things that were in being at the making of the Post Office Act, 1660 [repealed by Statute Law Revision Act, 1863] although exchequer bills were not then known, yet they shall be within the same reason, and the post as much bound to take and send them as any other thing whatsoever. Another instance of the like is in the same case in 4 Co. Rep. 4 by the Statute of Marlbridge, 1267. A man seised in fee, enfeoffing his son and heir to defraud the lord of his wardship, the feoffment is made void as to the lord. By the Feoffments to Uses Act, 1483 [repealed by S.L.R., 1863], a cestui que use has power to make a feoffment of the land out of which the use arises. By 4 Hen. 7, c. 17 [repealed by S.L.R., 1863] the heir of a cestui que use shall be in ward, and if, since that statute, a cestui que use makes a feoffment by virtue of the Act of 1483 to his son and heir, it shall be void by the Statute of Marlbridge, made two hundred years before. It will be as good an argument to say that, if one comes by the exchequer bill of another unlawfully, trover will not lie for it for that they are new things, as that they shall not be sent by post because they are new things. When an Act of Parliament creates a new interest, it shall be governed by the same law that like interests have been governed before.

It has been objected at the Bar (i) that the Postmaster is not bound to answer for bills of exchange payable "to bearer" because it was the party's folly to make them so payable; (ii) that he is not liable for the loss of them, although made payable the ordinary way, viz., "to such a man or order," because he is to have nothing for them as such, no hire or postage. As to (i), a bill of exchange payable to bearer is lawful, and it is prudence in any man that has a mind to negotiate a bill of exchange to get it drawn in that form, for then it needs no endorsement, and by consequence, if he does negotiate it, shall not be chargeable,

whereas, if it were made payable to one or order, for every negotiation there must be a new endorsement, and every endorsement becomes liable infinitum. All bills, without exception, are to be sent by post, and this sort of bill, being lawful, may, therefore, be sent. But they pay no reward for sending or carrying them. Therefore, the Postmaster ought not to answer for a miscarriage of them.

Answer: Whoever writes or sends a letter with a bill of exchange in it, it shall be intended that the letter was written and sent for the sake of the bill, and, therefore, although the post does not receive an immediate direct reward for the bill, yet it receives a mediate consequential one, as in the case of an innkeeper, a passenger pays nothing for the keeping of his goods in the inn, but pays only for his victuals and lodgings, and the reward which he pays for his victuals and lodgings entitles him to an action for the loss of his goods. Besides, exchequer bills are not exempt from paying, and without doubt if a man sends a great packet or bundle of them, he is bound to pay according to the bulk of his packet. Suppose nothing were due for exchequer bills, no more than to a sheriff for executing a writ of execution, yet, if the goods so taken in execution are lost, he shall answer for them, he being a public officer for that purpose. There never was an instance that an officer entrusted by law with the goods of a subject, but that, if he loses them, the officer by consequence of law was liable for them. *Southcote's Case* (9) is very strong, although, by the by, that case, as reported by Coke, is not all law, but where there is a special undertaking to keep the goods. For if there is but a general bailment and a general acceptance, and so the matter left to a construction of law thereupon, how the goods shall be kept the law will make construction; you should keep them as you do your own. But where there is a special acceptance to keep them safely, there, at your peril, you are bound by your special acceptance to keep them safe though you have no reward, and you are not compellable by law to take them, which is stronger than our case. When goods are given to an officer of law, surely it must be intended that they are to be safely kept, and, therefore, he shall be charged. I do not think there can be a case put, where a public officer or his deputy was ever discharged in a case against him for a miscarriage in them for goods, or other things, lost through their neglect.

Another reason to charge the defendant is because before the Post Office Act, 1660, the subject had liberty to send his packet by any other postmaster he pleased, of which there were many in those days, it being then lawful for any man to set up such an office. If such as had set up such an office then had been robbed, the subject would have had his action and recover against them as much as against a common carrier, and this is admitted by the other side. So it is very reasonable that those that take it now should take it upon the same terms it then stood, and the office is not new, but only that, instead of being exercised by many before, it is now exercised only by one, and all persons by this Act are forbidden to use any other post or to send by any but by this one that is to be by letters patent under the Great Seal. The postmaster was, as I said, chargeable at common law before and the employment is now the same as it was then, only that of being exercised by one person. Therefore, everything that was incident to it then remains so still. Since the subject is deprived of his election of trusting whom he pleased with his letter, surely to compel him to send by one against whom he should have no remedy would be the most unreasonable thing in the world, and the most unjust construction upon the statute.

It was objected at the Bar that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it. So they might anybody else on whom they could fix that fact, but for a neglect in him they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal, for a servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it, but for a misfeasance an action will lie against a servant or deputy, not quatenus a deputy or servant, but as a wrongdoer. As if a bailiff who has a warrant from the sheriff to execute a writ suffers his prisoner by neglect

to escape, the sheriff shall be charged for it and not the bailiff, but if the bailiff turns the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer, or rescuer, and it will lie against any other that will rescue in like manner. For this diversity, vide *Marsh* v. *Astry* (10); *Baldry* v. *Johnson* (11); Y.B. 41 Edw. 3, 12; *Barrett* v. *Winscombe* (12); *Laycock* v. *Under-Sheriff of Wilts.* (13), which is not well reported, but the inference may be well made from it.

Here the defendant has the power in him to manage the office by himself, his deputy or servant, and every deputy or servant is by him that puts him in, and, therefore, he ought to answer for him. The reason why a principal shall answer for his deputy is because as he, as principal, has power to put him in, so he has power to put him out, without showing any cause, and that though he had expressly given him an estate for life in the deputation: *Norton* v. *Simmes* (14); Y.B. 39 Hen. 6, 34. A deputy or servant may bring a greater mischief than this comes to upon his principal, for, if one has an office of inheritance, in its nature forfeitable for such and such offences or misdemeanours, and he puts in a deputy who commits such acts as would be a forfeiture in the principal if he had done them, he shall forfeit the office for his principal: Y.B. 39 Hen. 6, 34.

The case in 2 DYER, 238, pl. 38, to my great wonder has been quoted by GOULD, J., as an authority for him, for it is directly against him. By the Customs Act, 1425, any customer that shall conceal any of the King's customs due for merchandise shall forfeit treble the value of the merchandise, and by the Customs Act, 1558, the customer of any port may make a deputy for the customs of any creek belonging to that port. A deputy so appointed had concealed the custom, and the principal, ignorant of this fraud, certified his account into the exchequer without taking notice of this fraud or the custom due for the concealment, and an action was brought against the principal, and it was adjudged that it lay. What is the reason thereof, but because the principal shall answer for his deputy? Where it is said that the deputies of the Postmaster by the Act have power to make deputies, and they are to have servants who are to act under them that makes no matter, for the principal shall answer for all the neglects, not only of the deputies he makes, but also of that deputy's deputy and servants and so down, for he shall be answerable for every act of them that shall tend to the prejudice of another in their deputation. But that is not this case, for Breese in this case, through whose neglect this letter has been lost, was immediately put in by the defendant himself, though if it were by his deputy or servant, it had been the same.

POWYS, J., says they are all fellow-servants, that is, the Postmaster and letter carrier, because they all receive their salaries from the King, though retained and put in by the defendant, and he compares them to a steward and servants of a nobleman's house. But I answer that they are paid by the King as deputies and servants of the defendant and there is no diversity but in the manner of paying them, for they are under the command of the defendant, and to act according as he directs. It was intended by the Act that he should pay all his servants out of his salary, and if he agree with the King to have so much clear for himself and that the King shall pay his servants, they are no less his servants because the King pays them. If they are not his servants, what becomes of the defendant, who is by the Act to manage the office by him and his deputy and servants, and if he lets people manage it who are not his servants and over whom he has no power, and they embezzle goods or other things, surely the defendant shall answer for it, for he does not manage the office as the statute directs, and his letting people in that are mere strangers that ought not to be there at all shall not excuse him from neglect or other mischance.

But now my brother has found out a better employment for him and compares him to a captain, and his deputies and servants to the soldiers, of a company, and as the captain shall not answer for the valour and courage of his soldiers, so neither shall he for the care and diligence of his servants. I am of opinion that if any particular person suffers a particular prejudice by the want of courage of a soldier

whom the captain takes in by his own election, he shall have an action against the captain for it, but that is not the case, for where a trust is put in one person, and another, whose interest is entrusted to him, is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified. The case of a master of a ship is much more like that of a captain than the present, and yet he shall answer for the neglect of his seamen, and it is not his captainship will save him. He shall answer for a robbery committed on him on land, and for neglect of his men at sea; though he shall not be answerable for a robbery on the sea.

It seems plain to me the Act intended that he should be answerable for all the letters and packets they should receive, and for the default of their servants. For, first, it has given the whole power and government of the office to the master-general, and as this case is delivered to him, so nobody is to intermeddle but he and such as he shall entrust, and if this Act were said to create this office as a new office, notwithstanding the action would lie, for when an Act erects a new office for the benefit of the subject under the same circumstances with other offices in which the subject has an interest in respect whereof the person exercising them would be liable to an action for the default of his servant, it must be presumed the Act designed that the new officer should be liable, for why else should they make it so like in reason? In this case he is entrusted with the interest of the subject as much as the sheriff or other officer of justice is, and the Act directs that the letters should be sent with safe despatch. Who is to do that but the Post-master?

Further, it appears that it was the design of the statute that he should be answerable for the default of his deputy. For that consider these two clauses. First:

> "That the Postmaster and his deputies, and no other, should find horses; and if through default of the Postmaster, any person shall fail of getting horses, in all such cases the master shall forfeit £5."

Consider the words "and if through default of the master," not of his deputy, which shows they intended that, if any fault be, it shall be reckoned that of the master. For if one that rides post cannot be furnished with horses, who shall forfeit the £5 for every default? The master, and not the deputy; then surely the default of the deputy is the default of the master. This appears plainly by this branch of the Act. It is objected that this will ruin the office. But I think the contrary and that it will be the means to have the office well kept, and will make them more careful to do their duty and to discharge the trust reposed in them. It is objected that one may choose whether he will send his letter by post or not, for he may send a messenger of his own, and that is true, yet it is no excuse for the defendant, for if there be several inns on the road, and I go into one when I might go into another, and am robbed or otherwise lose my goods there, the election I had of using that or any other inn shall not excuse the innkeeper. So here, the plaintiff had election to send by the post or by messenger, and if he sends by post and there is default, he shall have his action. He cannot send by the messenger with speed as by the post. Speed was one of the benefits designed by the statute to the subject, and it took away the advantage he had of sending by a speedy messenger before, and so would put him in a worse condition which never was the intent of the Act. As to the smallness of the premium, there is nothing in that, for the law thinks it a reasonable reward, and if one does not like the conditions of an office, he may let it alone.

As to the clause in the patent that the defendant should not be answerable for any neglect, but his own immediate neglect, it must be intended only in relation to the management of the revenue for which they are to account to the lord treasurer, or to be against law, for it is not a grant by letters patent that shall deprive the subject of the benefit given by the Act. The Postmaster is to act according to the statute, and not according to the letters patent. Where it is said

A that they shall from time to time observe such directions as are sent to him under the sign manual, if any ill consequence happen by such an observation, they are not excused. I say then, that this clause that they shall not answer for miscarriage of servants or any but their own may have this effect, to exempt them from any mismanagement of the revenue of the office because, that being the King's, he may order that as he pleases. That clause in a patent shall never B deprive the subject of his benefit ordained for him by the statute, though, it were with a non obstante, when non obstantes were in their utmost vigour.

For these five reasons I hold the action lies: (i) because it is a public office, entrusted to them by Parliament, for the profit and benefit of the subject, which in its nature requires care and diligence; (ii) because the defendant has a reward for his care at the expense of the subject; (iii) the same reason holds to charge C them in this case as to charge carriers, innkeepers and such like, viz., the great inconvenience which would otherwise ensue by reason of the dangerous temptation and opportunity they would lie under to embezzle goods entrusted to them, without possibility of proving a particular neglect; (iv) they are within the meaning of the Post Office Act, 1660, liable, and, if that were not so, in this case the defendant would be liable by his acceptance; (v) they might send these things by other D messengers before the statute against whom an action would lie for miscarriage which is taken from them by this Act, which being designed for their benefit, it must be intended in reason that the statute leaves them a like remedy. These are my reasons, and I do not see any to the contrary.

But by the opinion of the other three judges, judgment was given for the defendants.

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MILLAR *v.* TAYLOR

[COURT OF KING'S BENCH (Lord Mansfield, C.J., Willes, Aston and Yates, JJ.), June 30, 1767, June 7, 1768, April 20, 1769, Trinity Term, 1770]

[Reported 4 Burr. 2303; 98 E.R. 201]

G *Custom—Essential characteristics—General right in a district—Existence from time immemorial.*

To constitute a legal custom it must have two qualities. It must import some general right in a district and not a few mere private acts of individuals, and in the next place it must appear to have existed from time immemorial. If the custom be general, it is the law of the realm; if local only, it is lex loci, H the law of the place.

Notes. As to the essential characteristics of custom, see 11 HALSBURY'S LAWS (3rd Edn.) 160–168. For cases see 17 DIGEST (Repl.) 8–16.

Action for breach of copyright.

I *Blackstone* for the plaintiff.
Murphy for the defendant.

YATES, J., in the course of his judgment, said: I will now consider the second general ground, upon which this perpetual copyright was argued at the Bar, namely, the supposed usage and law of this kingdom. Under this head, it was contended that the right of an author to the sole publication and perpetual monopoly of his works, though it were not maintainable on general principles, is yet a kind of customary property, a right that has always been allowed and supported in this kingdom.

If it was so, it is strange that in all our laws, where every kind of property is so much discussed, a claim so extensive as this is not absolutely established. Yet it was admitted by the plaintiff's counsel that they could not produce any one determination in a court of law that had established any such kind of property. They attempted, however, to set up some extraordinary substitutes to supply this deficiency. The first was the finding in the special verdict that before the reign of Queen Anne it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from hand to hand for valuable considerations, and to make them the subject of family settlements. A description thus painted, with the striking ideas of purchase and family possessions, may at first sight dazzle the eye and catch our passions, but, when nearer looked at, fairly viewed, and examined, we shall find it merely an illusion.

There are but two lights, in which it can be applied to the present question— either (i) as establishing a customary property in fact, or (ii) as showing that there was a general idea or notion of such a right antecedent the statute of Queen Anne [8 Anne, c. 21 (c. 19, Ruff.); repealed by Copyright Act, 1842]. With respect to the former, it is impossible that it can establish any customary claim. It is no usage of which the law can take notice, being merely an allegation of particular contracts which some individuals have made before the reign of Queen Anne. Whereas, to constitute a legal custom, it must have these two qualities: first, a custom must import some general right in a district and not a few mere private acts of individuals; and, in the next place, such custom must appear to have existed immemorially. All customs operate (if they have any operation) as positive laws. The mere fact of usage will be no right at all in itself, but when a custom has prevailed from time immemorial, it has the evidence and force of an immemorial law. If the custom be general, it is the law of the realm; if local only, it is lex loci, the law of the place.

All laws are general as far as the law extends, and all customs of England are, of course, immemorial. No usage, therefore, can be part of that law, or have the force of a custom, that is not immemorial. Here, no such general or immemorial usage is suggested. This finding is merely an allegation of particular contracts made with particular individuals before the reign of Queen Anne. This, it is true, appears from this finding, that before the reign of Queen Anne copies [of books] have been purchased for valuable considerations and made the subject of family settlements. But, how long before? Whether one hundred years, fifty years, or ten years, is not stated. Very certainly, it could not be immemorial. For, the art of printing was not known in this kingdom till the reign of Edward IV [1461–83]. Therefore, these contracts could not be derived from the ancient immemorial law of the land, and, consequently, they could not create a species of property which was unknown to that law.

It is, indeed, impracticable to draw any inference from such a proposition as this is. For, the verdict does not find that these rights were ever enforced against strangers. The parties would, undoubtedly, acquiesce in the agreement, and the families on whom they were settled would not reject a settlement, however, chimerical. But, unless it was shown that these claims have been enforced against strangers, no private contracts or family settlements can impose a law upon the public.

It is said that they serve to show there was a general idea and apprehension of the existence of such a right, before the statute of Queen Anne. Admit the idea had been ever so general; what are we thence to infer? If the ideas and sentiments and apprehensions of individuals were sufficient ground whereupon to establish a species of property, what a vast extent would this carry it to! Immense ideas of property were raised in the South Sea stock in the year 1720. In that year, innumerable rights of this kind were bought and sold, and these transactions passed between parties whose ideas were as sanguine as any authors could be that the ideas they sold were real property. Yet the subjects that were sold were, in truth and fact, no real property. The goodwill of a shop, or of an ale-house, and the

custom of the road (as it is called among carriers) are constantly bargained for and sold, as if they were property. But what are these? Nothing more than the goodwill of the customers who may withdraw from them the very next day if they please. The purchaser of this custom or goodwill gains no certain property in it. He has no power to confine it to himself, nor can he use any power to prevent other people from gaining the custom. It is an advantage, indeed, so far of service, as it gives the purchaser a priority for custom. So it is in the case of the publication of a book; it gives a priority, and gets a set of first customers. But none of these cases can establish an absolute, perpetual, exclusive property.

Whatever ideas individuals may form, or however they may traffic among themselves in imaginary claims, they cannot affect the real right of the public who are no parties to such contracts. They cannot create law. It is a well-known maxim in our law that no man can by any device whatever, create a new consequence out of an estate, or innovate upon the law of the land. He cannot annex to his estate any novel conditions that are inconsistent with the nature of the estate; much less can the acts or interests of individuals abridge the public of their natural right, or establish monopolies.

ARMORY *v.* DELAMIRIE

[COURT OF KING'S BENCH (Sir John Pratt, C.J.), Hilary Term, 1722]

[Reported 1 Stra. 505; 93 E.R. 664]

Personal Property—Finder's property in property found—Jewel—Trover—Damages.

The plaintiff, a chimney sweeper's boy, found a jewel and took it to the shop of the defendant, a goldsmith, to know what it was. He delivered it into the hands of an apprentice who, under pretence of weighing it, took out the stones, and, he calling to the defendant to let him know it came to three halfpence, the defendant offered the plaintiff that money. The plaintiff refused to take it and insisted on having the jewel back, whereupon the apprentice gave him back the socket without the stones. In an action of trover against the defendant,

Held: (i) the finder of a jewel, though he did not by such finding acquire an absolute property or ownership, had such a property as would enable him to keep it against all but the rightful owner, and might maintain trover; (ii) several of the trade having been examined to prove what a jewel of the finest water that would fit the socket would be worth, the jury, unless the defendant produced the jewel and showed it not to be of the finest water, should presume the strongest against him and make the value of the best jewels the measure of the damages.

Notes. Applied: *Webb* v. *Fox* (1797), 7 Term Rep. 391; *Lupton* v. *White*, [1803–13] All E.R.Rep. 356; *Sulton* v. *Buck* (1810), 2 Taunt. 302. Followed: *Mortimer* v. *Cradock* (1843), 12 L.J.C.P. 166. Applied: *Bridges* v. *Hawkesworth*, [1843–60] All E.R.Rep. 122; *Dean* v. *Thwaite* (1855), 21 Beav. 621; *Gray* v. *Haig* (1855), 20 Beav. 219; *Williams* v. *Williams* (1863), 33 Beav. 306. Considered: *Buckley* v. *Gross* (1863), 3 B. & S. 566; *Wentworth* v. *Lloyd* (1864), 10 H.L.Cas. 589. Applied: *Bourne* v. *Fosbrooke* (1865), 18 C.B.N.S. 515; *Hammersmith and City Rail. Co.* v. *Brand*, [1861–73] All E.R.Rep. 60; *Wilson* v. *Northampton and Banbury Junction Rail. Co.* (1874), 43 L.J.Ch. 503; *The Winkfield*, [1900–3] All E.R.Rep. 346; *Coldman* v. *Hill*, [1918–19] All E.R.Rep. 434; *Banco de Portugal* v.

Waterlow & Son, Ltd. (1931), 47 T.L.R. 359. Referred to: *Burton* v. *Hughes* (1824), 9 Moore, C.P. 334; *Taylor* v. *Haygarth* (1844), 8 Jur. 135; *White* v. *Mullett* (1851), 6 Exch. 713; *Chowne* v. *Baylis*, [1861–73] All E.R.Rep. 944; *R.* v. *Gardner* (1862), 1 New Rep. 107; *Ancona* v. *Marks* (1862), 7 H. & N. 686; *Mussamat Sundar* v. *Mussamat Parbati* (1889), 5 T.L.R. 683; *Plasycoed Collieries Co.* v. *Partridge, Jones & Co.* (1912), 81 L.J.K.B. 723; *Eastern Construction Co.* v. *National Trust Co. and Schmidt*, [1914] A.C. 197; *Smith* v. *Great Western Rail. Co.* (1920), 37 T.L.R. 117; *Re Wells, Swinburne-Hanham* v. *Howard*, [1932] All E.R.Rep. 277; *Hannah* v. *Peel*, [1945] 2 All E.R. 288.

As to gratuitous bailment, see 2 HALSBURY'S LAWS (3rd Edn.) 9 et seq.; and for cases see 3 DIGEST (Repl.) 62 et seq.

Action of trover for a jewel, tried by SIR JOHN PRATT, C.J., at nisi prius.

The plaintiff, being a chimney sweeper's boy, found a jewel and took it to the defendant's shop (who was a goldsmith) to know what it was. He delivered it into the hands of the defendant's apprentice who, under pretence of weighing it, took out the stones and called to the master to let him know it came to three halfpence. The master offered the plaintiff that money, which he refused to take and insisted on having the jewel again, whereupon the apprentice gave him back the socket without the stones. In an action of trover against the master,

SIR JOHN PRATT, C.J., ruled the following points: (i) That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

(ii) That the action well lay against the master who gives a credit to his apprentice and is answerable for his neglect.

(iii) As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and SIR JOHN PRATT, C.J., directed the jury that, unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of their damages, which they accordingly did.

FOLEY *v.* BURNELL

[House of Lords, April 27, 1785]

[Reported 4 Bro. Parl. Cas. 319; 1 Bro.C.C. 274; Rom. 1; 2 E.R. 216]

Settlement—Heirlooms—Liability to be taken in execution—Debts of tenant for life.

A testator devised his real estates and mansion houses in trust for his son E. for life and thereafter to E.'s son in tail male. He also left plate and other chattels to be enjoyed as heirlooms by the persons in possession of the mansion houses. E., when tenant for life, removed the plate to his own house where it was taken in execution for his debts by the sheriff under a writ of fieri facias. Before the execution E. had an infant son who lived for fourteen days, and, subject to E.'s life interest, became tenant in tail of the whole estate. On a bill to determine whether the plate was liable to be taken in execution,

Held: on the birth of the infant son the chattels vested in him as tenant in tail absolutely; on his death they vested in E., his father, as his personal representative; and, therefore, they were liable to be taken and sold to pay E.'s debts.

Notes. As to whether heirlooms may be taken in execution, see 16 Halsbury's Laws (3rd Edn.) 46; and for cases see 21 Digest (Repl.) 582, 583.

Appeal from a decree of Lord Thurlow, L.C., dismissing a bill whereby trustees prayed for the delivery up by the sheriffs of Middlesex of certain heirlooms taken by them in execution of the tenant for life's debts. Lord Foley, the father of the appellant, Andrew Foley, being in his lifetime and at the time of his death seised in fee simple of a considerable real estate, and possessed of a considerable personal estate, duly made and published his last will and testament in writing, dated June 19, 1777, and thereby (among other things) he gave and devised all his capital messuage or mansion house, parks and hereditaments, called Stoke Court; and all the manors, messuages, lands, tenements and hereditaments situate in the parishes of Stoke Edith, Ashpurton, Stretton, Tarrington otherwise Taddington, Yarkhill, Weston Beggar, Woolhope, Dormington, Mordiford Stretton, Bishops Froome, Pixley, Munsley, Much Cowarne and Westhide; and also all the manors of Showle, Donnington, Monkhide otherwise Taddington, Yarkhill and Weston Beggar; and also all the perpetual advowsons and donations of the parish churches of Stoke Edith, Tarrington, St. Peter's in Hereford, Donnington and Mordiford, and all other the manors, messuages, farms, lands, rents and hereditaments, whereof or wherein his late father, Thomas Foley, was seised or possessed, or had any estate of inheritance; and all other his manors, messuages, lands, tenements and hereditaments of what nature or kind soever the same respectively were lying and being in the parish of Stoke Edith, or in all or any of the last-mentioned parishes in the county of Hereford, with their and every of their rights, members and appurtenances; and also all his manor of Malvern, and all capital and other messuages, lands, tenements and hereditaments of what nature or kind soever the same respectively were, together with its rights, members and appurtenances, to his brother Robert Foley, Doctor in Divinity, and Abraham Turner, since deceased, their executors, administrators and assigns, for the term of 101 years, to commence from his death, without impeachment of waste, on the trusts thereinafter mentioned.

After the end or determination of that term, he gave the aforesaid property to the use of Edward Foley, the testator's second son, and his assigns for life, remainder to trustees to preserve; and from and after his death, to the use of John Hodgetts and Robert Foley, their executors, administrators and assigns, for the term of 102 years from the death of Edward Foley, without impeachment of waste, in trust for providing a jointure or jointures for any wife or wives Edward

Foley should happen to marry as therein mentioned; and after the determination of the said term of 102 years, and subject thereto, to the use of Rowland Berkeley and Thomas Wickens, their executors, administrators, and assigns, for the term of 500 years from the decease of the said Edward Foley, in trust to raise portions for younger children as therein mentioned. A

And after the determination of the said term of 500 years, and subject thereto, to the use of the first, second, third and all and every other the son and sons of the body of the said Edward Foley, lawfully to begotten, successively in tail male and in default of such issue, to the use of the appellant, Andrew Foley, and his assigns for life, with the like powers for making jointures and raising portions as are thereinbefore given to the said Edward Foley; remainder to trustees to preserve, and remainder to the use of the first, second, third and all and every other the son and sons of the body of the said appellant Andrew Foley lawfully to be begotten, successively in tail male, with divers remainders over. B C

The testator devised certain other capital messuages or mansion houses and premises, called Great Witley and Foley House, for the benefit of his other children as therein mentioned, and he thereby gave and bequeathed all the standards, fixtures, household goods, implements of household and furniture, pictures, tapestry, gold and silver plate, china, porcelain, glass, statues, busts, library, and books, which should be in his capital messuages or mansion houses, called Stoke, Great Witley, and Foley House, to be held and enjoyed by the several persons who from time to time should successively be entitled to the use and possession of the same houses respectively, as and in the nature of heirlooms, to be annexed to and go along with such houses respectively for ever: but it was his will and intention that one of the services of table plate, belonging to Thomas late Lord Foley therein named, should go to and be enjoyed by the possessor of Witley, and the other to the possessor of Stoke for the time being. D E

Concerning the said several terms of 99 and 101 years, respectively limited to Robert Foley and Abraham Turner, it was thereby declared that the same terms were so respectively limited on this special trust and confidence, and to the intent and purpose that the said Robert Foley and Abraham Turner, and the survivor of them, and the executors, administrators and assignees of such survivor, should yearly and every year receive and take the rents, issues and profits of all and every the manors, messuages, lands, tenements and hereditaments comprised in the said several terms respectively; and also should from time to time fall and cut down, or cause to be fallen and cut down, so much and such parts of the timber, wood and underwood growing on or within the manors, lands and hereditaments comprised in the same terms, as they or the survivor of them, or the executors, administrators or assigns of such survivor, should in his or their judgment and discretion think proper to be fallen, not exceeding in any one year the clear sum of £3,000 (without defacing or disfiguring the ornamental plantations in or near his several parks or capital mansion houses of Great Witley and Stoke aforesaid), and to pay, apply and dispose of so much of the money arising from those funds as would be sufficient (with the rents and arrears of rent of the premises comprised in the same terms, that should be due at his decease, which he also gave and bequeathed to them his said trustees as aforesaid) in manner following. F G H

In the first place, according to their will and pleasure and not otherwise, to allow yearly and every year, or more frequently, to or for the use or benefit of his said two sons Thomas Foley and Edward Foley, any sum or sums of money not exceeding in the whole in any one year the sum of £6,000 until such of the debts of Thomas Foley and Edward Foley as were therein provided for and should be due at his decease were first paid and discharged; but so as his said two sons, or either of them, should have no estate, right, title, claim or interest in the rents, issues and profits of his said manors, messuages, lands, tenements and hereditaments comprised in the said terms for and during the respective lives of his said two eldest sons, and the life of the survivor of them, other than such as Robert Foley and Abraham Turner, and the survivor of them, and the executors, I

administrators and assigns of such survivor, should in their absolute, free and uncontrolled power, discretion and inclination think proper and expedient.

And in the next place thereout to pay so much and such part of the principal sum and interest due on a mortgage by him and his said eldest son made to Robert Child, dated July 2, 1773, as should be unsatisfied at his decease. In the next place thereout to pay and discharge all such the debts of his said two eldest sons Thomas Foley and Edward Foley, and the interest due thereon respectively, as in any schedule or schedules thereunto annexed, or any other schedule or schedules by him thereafter to be made and subscribed, should be contained, or as they his said trustees in their judgment and discretion should think fit and expedient; but so as none of the creditors of his said sons Thomas Foley and Edward Foley, other than such whose debts should be so scheduled, should have any lien upon or power over any of the manors, messuages, lands, tenements and hereditaments comprised in the said several terms, or either of them, or on the timber growing thereon, or on the money arising or to arise thereby in any manner whatsoever.

And after the death of the survivor of his two eldest sons, the payment of the mortgage money, and of all the scheduled and other debts therein before mentioned, and also the costs, charges and expenses of Robert Foley and Abraham Turner, and the survivor of them, and the executors, administrators, and assigns of such survivor; his will was that the said terms should wait on and attend the inheritance of the said manors, messuages, lands, tenements and hereditaments comprised therein. The testator appointed the appellant, Andrew Foley, Grace Lady Clanbrassil, Mary Foley and Ann Winnington, the wife of Edward Winnington, and his brother, Robert Foley and Abraham Turner, executors and executrices of his will.

The testator afterwards duly made and published a codicil to his will, dated Sept. 17, 1777, reciting, that since the execution of his will Abraham Turner had died and that thereby the two terms of 99 years and 101 years, devised to his brother, Robert Foley, and Abraham Turner by his will, would on his decease become vested solely in his brother, Robert Foley; and that his intent then was that the appellant, Andrew Foley, should be substituted as a trustee in the room and place of Abraham Turner.

The testator did by his codicil, and which he desired might be taken as part of his will, give and devise all those manors, messuages, lands, tenements and hereditaments, therein mentioned to be by his said will given and devised to and to the use of his brother, Robert Foley, and Abraham Turner, their executors, administrators and assigns, for the said terms of 99 years and 101 years, with their rights, members and appurtenances, unto and to the use of his brother, Robert Foley, and the appellant, Andrew Foley, for the terms of 99 years and 101 years respectively, to commence from his decease, on the same trusts, and to and for the same uses, intents and purposes, as in his said will were mentioned and declared of and concerning the terms thereby devised to his brother Robert Foley and Abraham Turner.

The testator died soon afterwards without having revoked his will or codicil, or altered his will otherwise than by the codicil. Robert Foley (the testator's brother, since deceased) and the appellant, Andrew Foley, duly proved the will and codicil in the Prerogative Court of Canterbury, and took on themselves the execution thereof.

Robert Foley and the appellant, as acting executors, some time after the death of the testator, permitted the respondent, Edward Foley, to take possession of one of the services of plate left by the testator's will, as an heirloom for the use of the several persons who from time to time should be entitled to the use and possession of the house at Stoke, the respondent being the first tenant for life of the house, subject to the term of 101 years.

The respondent then caused a considerable part of the service of plate which was so devised as an heirloom with the house at Stoke, to be removed from thence to a house he then occupied in Portland Place, in the county of Middlesex, without

the consent or knowledge of the appellant or Robert Foley. John Grant and John Battye, two of the respondents, who severally claimed to be creditors by judgment of the respondent for considerable sums of money, caused writs of fieri facias to be issued, directed to the sheriff of Middlesex, in order to have two sums of £1,174 and £401 with the expenses levied on the goods and chattels of the respondent; and on March 15, 1779, John Burnell and Henry Kitchen, the sheriffs of Middlesex, the other respondents, under the authority of the writs, took in execution all the plate so removed by the respondent. On the same day the appellant gave the respondents, Burnell and Kitchen, notice that the plate was not Edward Foley's, but was part of the testator's plate, and had been left by him as an heirloom.

The respondent had not at present any issue male of his body, and the appellant was the next tenant for life of the house at Stoke, if the respondent should die without issue male; and the appellant was now the first tenant in tail thereof now in being under the limitations in the will.

In Hilary Term, 1779, the appellants, Andrew Foley and Robert Foley, exhibited their bill in the Court of Chancery against the respondents Burnell, Kitchen, Grant, Battye, Edward Foley, and Robert Foley since deceased. The bill was afterwards amended, and the respondent, Robert Dallas, made a party thereto. The appellants in the bill stated the particulars above mentioned, and thereby prayed that Burnell and Kitchen might be decreed to deliver up all the plate which had been taken by them in execution, and that the same might be replaced in the house at Stoke, there to remain as an heirloom for the benefit of the several parties interested therein under the will of the testator; and that in the meantime they might be restrained by the order or injunction of that court from making any sale of the plate or any part thereof; and that Grant and Battye might in like manner be restrained from calling on the sheriff for returns of the writs of fieri facias, and from all proceedings against them for not making returns thereof; but if it should appear that the sheriff had sold the plate or any part thereof, that Grant and Battye might be decreed to replace and make good the same; and for further relief. The appellants annexed to their bill a schedule of the plate which had been so taken in execution.

To this bill the respondents appeared and put in their answers. John Grant stated in his answer that he had agreed to become the purchaser of two annuities of Thomas Foley, the eldest son of the testator, and Edward Foley, for their lives and the life of the survivor of them, of £100 each, to be paid quarterly, for the sum of £700 each; and that the same were secured by the bonds of Thomas Foley and Edward Foley, and warrants of attorney to confess judgments thereon; and that judgments had been duly entered up in the Court of Common Pleas on the same.

He also stated two indentures, each dated May 4, 1776, and made between the respondent, John Grant, of the one part, and the respondent, Robert Dallas, of the other part, whereby John Grant, in consideration of the sums of money in the said indentures mentioned to have been paid to him by Robert Dallas, assigned, transferred and set over to Robert Dallas, his executors, administrators and assigns, the said bonds and the judgments obtained thereon. John Grant said that since the execution of the assignments, he had no interest in the said annuities or the securities for the same or either of them; but they were the property of Dallas, who sued out the writs of fieri facias in the name of Grant.

Robert Dallas by his answer admitted that he caused two writs of fieri facias to be issued out in the name of John Grant on the two judgments, by virtue of which sundry pieces of plate were seized at the house of Edward Foley; and he annexed a schedule of the plate to his answer. He said that he believed part of it to have been the property of the testator, but insisted that the whole of the plate mentioned in his schedule could not be called or included under the appellation or description of a table-service of plate, and also that nothing found or seized in the house of Edward Foley, in Portland Place, could be looked on or protected as an heirloom belonging to the house at Stoke. He submitted to the judgment

of the court whether the appellants had any right to resort to that court for relief.

Battye by his answer, admitted that he caused a writ of execution to be issued and delivered to the Sheriff of Middlesex, in order to have the sum of £401, the arrears of the annuity secured and judgment levied on the goods of Edward Foley, that the same was delivered after the writs issued out by Dallas, and that a quantity of plate was taken by virtue of those writs. He submitted to the judgment of the court, in case the plate was part of the testator Lord Foley's plate by his will devised as an heirloom to the house at Stoke, whether, as the same was found in Edward Foley's house in Portland Place, and appeared to be his property, the same ought not to be sold under the said executions.

Burnell and Kitchen in their answer admitted that two of their officers by virtue of their warrants, took a quantity of plate in execution to satisfy the judgments in the dwelling-house of Edward Foley, and that the same was in the custody of their officers. Edward Foley and Robert Foley (who died before the decree was pronounced) in their several answers alleged nothing against the interests of the appellants or their relief in the premises.

Replications were filed to the answers and the cause being at issue, several witnesses were examined on behalf of the appellants, and the same came on to be heard before Lord Thurlow, L.C., on Feb. 1 and 4, 1780, when his Lordship ordered the same to stand over for consideration. The same came on again for judgment on Mar. 21, 1783, when his Lordship ordered the appellants' bill to be dismissed as against the respondents Burnell and Kitchen and Robert Foley, with costs to be taxed by the Master, and as against the other respondents without costs. But Lord Thurlow, L.C., determined the cause on the fact of the birth of a son of the respondent Edward Foley, who died fourteen days after he was born, in 1779, which was not in issue between the parties and was not alleged in any of the answers, nor observed on at the hearing of the cause, but was mentioned in the deposition of one of the witnesses.

The appellants, apprehending their bill was dismissed on the ground that the absolute property of the plate so devised as an heirloom vested in such son on his birth, subject to the prior interests therein, and on his death became vested in Edward Foley, as his father and sole next-of-kin, and being advised that no interest vested in such son on his birth, presented a petition to his Lordship for a rehearing of the cause. The same came on to be re-heard before the Lords Commissioners (Lord Loughborough, Ashhurst and Hotham) on May 17, 1784, when the cause being part heard, was adjourned to May 24, when their Lordships confirmed the decretal order.

The appellants appealed from the decretal orders of Mar. 21 and May 24.

Pryce, *Kenyon* and *Poole* for the appellants: The rules of law permit personal property to remain in contingency, and not absolutely to vest until a future event shall happen, provided it is not to take place at too remote a period. That the event in this instance was when any son of Edward Foley should become entitled under the limitations in the will to the possession of the mansion-house at Stoke; an event which must take place, if ever, on the death of Edward Foley, and within the time allowed for bequests of that sort to vest. That the plate and furniture were so bequeathed by the testator appeared by the will, for the bequest was: "To the several persons who from time to time should respectively and successively be entitled to the use and possession of the house at Stoke." There were no other words descriptive of the persons to take. Therefore, it is submitted that to make the plate and furniture vest in a child of Edward Foley, who never was in possession or entitled to the possession of the house at Stoke, and who died in a few days after his birth, was a construction directly contrary to the express words of the will.

The construction put on this clause of the will by the decree was contrary to the intention of the testator, which in a question of construction is the most material consideration. The will appeared to have been planned for the purpose

of securing his large property to his family against those creditors of his two eldest sons, of whose demands he did not approve, namely, those who had supplied them with money for annuities purchased at inadequate prices. Among that number were the respondents, Grant and Battye. The payment of their other debts was provided for by the will. A

With this view he left the bulk of his real property to trustees for the terms of 99 and 101 years, and it could not be doubted that he inserted the clause in question still further to effectuate that purpose, that his mansion-houses might not be stripped of the plate and furniture by those creditors. It must surely be deemed inconsistent with the intention of a testator, making his will on such a plan, to have the plate belonging to one of his mansion-houses liable to be taken in execution for the debts of one of his sons, on an event which at the time of making the will was not improbable, whereby all the limitations of such plate to his other children would be defeated; it was to suppose he intended that which he appeared to guard against. B C

Mansfield and *Scott* for the respondents: The general intent of the testator was to annex the personal property in question to the real estate in the nature of heirlooms. The infant son of Edward Foley, on his birth, acquired an estate tail in the real property, to which these heirlooms were annexed. The extent of his interest in the heirlooms, therefore, was such as a tenant in tail of personal property has in consideration of law. That interest by the law is considered as absolute, and of course this infant son on his birth became the absolute owner of the property in question, subject only to the interest his father had in it for his life. The consequence is, that on the death of the son the property vested in Edward Foley his father and was, therefore, liable to be taken in execution for his debts. D E

The appellants contend that the testator intended that no son should be entitled to the heirlooms in question until he attained the age of 21 years, or until he was entitled to the possession of the estate to which they were annexed. It could not be denied that the testator by law might have limited this property to serve either of these purposes. The appellants were not able to determine for themselves whether the testator meant to express an intention to restrain the vesting of an absolute interest in the property until a son should attain 21 years of age, or a purpose to postpone it until a son should become entitled to the possession of the estate. Whether the former or the latter intention should be imputed to the testator, the respondents contend that both were implied intentions, and that neither was manifest or clear of doubt. F

If the appellants insist that the absolute interest in the property was to vest in a son at his age of 21 years, the respondents insisted that no mention was made in the testator's will of that period; and if the infant's father should be living when he attained his age of 21 years, the son would not answer the description of an owner of the plate contained in the will, which gives it only to persons entitled to the use and enjoyment of the houses to which it is annexed. G

On the other hand, if it is contended that the testator meant that the interest in the plate should not become absolute until a son tenant in tail became entitled to the possession of the estate, it follows that although, if the son attained his age of 21 years in the lifetime of his father, and they together might have suffered a recovery of the real estate, and have sold or pulled down the house to which this plate is annexed by the will, yet they could not have disposed of the plate, because during the lifetime of the father the son could not be entitled to the possession of the house. It could not be the testator's intention to preserve the plate longer than it was in his power to restrain the alienation of the house to which he annexed it. It is probable that the testator would have provided for this case if it had been suggested to him that it might happen. However, it is unnecessary to state the danger of construing wills with reference to what a testator would have done in every possible case that might have been stated to him, but which does not appear from the words of his will to have occurred to his mind. If Edward Foley H I

had died, leaving an infant son of the age of a week or a day, and that son had survived him but an hour, in which case he would have been for that hour tenant in tail of the real estate and entitled to have the possession of it, this personal property would undoubtedly have belonged absolutely to the personal representative of the infant. The testator's anxiety to preserve the plate was certainly not more disappointed by the case which had actually happened, than it would have been in the case here supposed.

The reported cases, in which it has been held that the interest of a tenant in tail in heirlooms did not vest until he attained 21 years or became entitled to the possession of the real estate, prove only that, by clear unambiguous words, personal property may be so limited, but cannot be considered as authorities against the two determinations which have been made in the present case, in which it has been held that the testator had not, or had not sufficiently expressed, an intention to limit it in that manner. If this property was protected against executions for the debts of Edward Foley while it continued in the house to which it was annexed, the respondents contend that the protection ceased when he was suffered to remove it from that house. They also disputed the power of a testator to exempt personal estate from the legal demands of the creditors of a person to whom he thought proper to give the possession of such property.

[After hearing counsel on this appeal on July 12 and 13, 1784, the following question was put to the judges: "Whether Edward Foley had such interest in the plate in question in this cause as rendered the same liable to an execution at the suit of the creditor, or whether the plaintiff had any such interest therein as barred such execution?" The judges, having differed in opinion, were heard seriatim, whereupon it was ordered and adjudged that the appeal should be dismissed, and the decree therein complained of, affirmed.]

Appeal dismissed.

EYRE *v.* COUNTESS OF SHAFTESBURY

[Lords Commissioners (Sir Joseph Jekyll, M.R., Gilbert, B., and Raymond, J.), May 15, 1725]

[Reported 2 P.Wms. 102; Gilb. Ch. 172; 2 Eq. Cas. Abr. 710, 755; 24 E.R. 659]

Infant—Guardian—Appointment by court—Prohibition of marriage without guardian's consent—Punishment for entering into or conniving in marriage without consent—Sequestration.

The law is particularly favourable to and careful of an infant's interests. Where the court makes an order appointing a person to be the guardian of an infant there is to be implied in the order a prohibition against the infant marrying without the guardian's consent. Entering into or conniving in a marriage without consent may be punished by the court by the issue of a writ of sequestration against the offender.

Guardian—Survivorship—Several guardians appointed—Continuance of survivor as guardian.

By his will a testator devised the guardianship of his son during infancy to three persons without adding "and to the survivor of them."

Held: a guardianship was not assignable and did not go to a deceased guardian's executor or administrator on his death, but it was an authority coupled with an interest and not a naked authority, and, therefore, where three persons were appointed by a will and two of them died the survivor continued as sole legal guardian without any provision to that effect in the will.

Notes. Considered: *De Manneville* v. *De Manneville* (1804), 10 Ves. 52. Explained: *A.-G. Magdalen College, Oxford* (1854), 18 Beav. 223. Applied: *Bell* v. *Holtby* (1873), L.R. 15 Eq. 178. Referred to: *Raymond's Case* (1734), Cas. temp. Talb. 58; *Earl of Pomfret* v. *Lord Windsor* (1752), 2 Ves. Sen. 472; *Mansell* v. *Mansell* (1757), Wilm. 36; *A.-G.* v. *Downing* (1767), Wilm. 1; *R.* v. *Green* (1781), 3 Doug.K.B. 36.

As to guardianship of infants, see 21 Halsbury's Laws (3rd Edn.) 203 et seq.; and for cases see 28 Digest (Repl.) 650 et seq. For the Tenures Abolition Act, 1660, see 20 Halsbury's Statutes (2nd Edn.) 371.

Cases referred to:

(1) *Curle's* (*Auditor*) *Case* (1610), 11 Co. Rep. 2 b; 77 E.R. 1147; 11 Digest (Repl.) 662, *859*.

(2) *Packer* v. *Wyndham* (1715), Prec. Ch. 412.

(3) *Hannes* v. *Wough* (1713), 2 Eq. Cas. Abr. 754; 22 E.R. 639, L.C.; 28 Digest (Repl.) 714, *2247*.

(4) *Ratcliff's Case* (1592), 3 Co. Rep. 37a; 76 E.R. 713; 28 Digest (Repl.) 652, *1461*.

(5) *Beverley's Case* (1603), 4 Co. Rep. 123b; 76 E.R. 1118; 33 Digest (Repl.) 585, *1*.

(6) *Viscount Falkland* v. *Bertie* (1698), 2 Vern. 333; Holt, K.B. 230; 23 E.R. 814; 1 Eq. Cas. Abr. 110; Freem. Ch. 220; 3 Cas. in Ch. 129; 12 Mod. Rep. 182; 1 Salk. 231; on appeal, Colles, 10; 28 Digest (Repl.) 533, *468*.

(7) *Lady Teynham* v. *Lennard* (1724), 4 Bro. Parl. Cas. 302; 2 E.R. 204, H.L.; 28 Digest (Repl.) 655, *1498*.

(8) *Bedell* v. *Constable* (1668), Vaugh. 177; 124 E.R. 1026; 28 Digest (Repl.) 651, *1442*.

(9) *Crabbe* v. *Tooker* (1650), Poph. 204.

Petition for an order for the custody of an infant.

By his will, dated Nov. 10, 1710, the Earl of Shaftesbury devised the guardianship of the person and estate of his infant child, who succeeded him in the earldom, to Mr. Justice Eyre and two others (since deceased), without saying "and to the survivor of them," until the child should come to 21 years of age. Lord Shaftesbury died beyond the seas, and the infant earl was twelve years of age when Mr. Justice Eyre, perceiving that his lordship had not a proper governor provided for him by the countess his mother and that the person who was ordered to attend him as his gentleman was not a fit person for that purpose, petitioned the Lord Chancellor that he, as sole surviving guardian, might have the ordering as he should think proper of such governor, gentleman and other servants to attend the infant earl, and that the person of the infant earl might be delivered over to him (the petitioner).

LORD MACCLESFIELD, L.C.—The father by the Tenures Abolition Act, 1660, s. 8, has a right to dispose of the guardianship of his child until twenty-one, and, he having done so here, it will be binding unless some misbehaviour is shown in the guardian, in which case it being a matter of trust, this court has a superintendency over it.

As to the objection that this right of guardianship does not survive because it is not said in the will in express terms that it shall go to the survivor, there seems to be no colour for it, because where several guardians are appointed by a will each of them seems to be a complete guardian, like the case where there are two or three churchwardens of a parish, each of them is a distinct churchwarden, and it would be mischievous, and of very ill effect, if where there are several guardians appointed by a will and some refuse to act that the rest should not be able to do anything. Yet this must be the consequence if a guardianship devised to several should be taken to be one joint naked authority. Such a construction would make the Act of little force. A guardian has an authority coupled with an interest, and may bring a writ of ravishment of ward on the infant's being taken from him, and

A although it is true that the damages recovered shall by the statute go towards the benefit of the ward, yet the declaration must lay it ad dampnum of the guardian the plaintiff.

The reason of *Curle's* (*Auditor*) *Case* (1), where, on the office of auditor being granted to two, without saying "and to the survivor," such office, on the death of one, was held to be determined was because in such case both made but one B officer, as the two sheriffs of Middlesex make, as to their office, but one person. In the present case, here is a plain right placed and vested in Mr. Justice Eyre as the surviving guardian, who, everyone is assured, will well execute such trust, which it will be impossible for him to do without being allowed to place and choose the governor, gentleman, etc., to attend upon and take care of this young nobleman. Though Dr. Stubbs may be a good, learned, and pious man, yet he C may not be so fit to attend the young earl to all places, for instance, to court, places of exercise, and diversions, etc., at which it may be proper for his lordship to appear. But I must differ from Mr. Justice Eyre as to sending the infant to a public school, which may be thought likely to instil into him notions of slavery.

The Court, therefore, directed that Dr. Stubbs should be discharged from being D governor, as also Mr. Bennet from being gentleman, and that the infant should be delivered into the hands of his guardian, Mr. Justice Eyre, who desired the young earl might dine with him. But this was in confidence that the judge should return him to his mother, the countess, at night, for that as yet the court would not make any order touching the custody of the earl's person.

Mar. 18, 1724. On the Great Seal's being taken from the Earl of Macclesfield E and placed in the hands of three Lords Commissioners [Sir Joseph Jekyll, M.R., Gilbert, B., and Raymond, J.], Mr. Justice Eyre, who had lately been made Lord Chief Baron of the Exchequer, exhibited his petition to the Lords Commissioners, setting forth the former proceedings and that the infant earl, who was now just fourteen years of age and had been married to Lady Susanna Noel, daughter to the Countess of Gainsborough, was detained from the petitioner; that this marriage F was without the consent or privity of the Lord Chief Baron, the surviving guardian; and that, therefore, he thought it his duty to lay these things before the court, praying that the custody or tuition of the infant earl might be granted to him, and that the court would make such order touching this matter as they should think proper. Upon this the Countess Dowager of Shaftesbury petitioned the Lords Commissioners that the order of the late Lord Macclesfield declaring the right of G guardianship to belong to the Lord Chief Baron Eyre and directing the person of the infant earl to be delivered to him might be set aside. Also, the infant earl petitioned the Lords Commissioners contending that the guardianship of his lordship given by the will was determined by the death of two of the guardians, and praying that his lordship being now of the age of fourteen years might be at liberty to choose his guardian.

H On hearing these petitions, the court ordered a sequestration, unless cause shown, against the Countess of Shaftesbury and the Countess of Gainsborough for their contempt in contriving and effecting the marriage without the consent of the guardian and without applying to the court. The person of the infant earl was ordered to be restored by the Countess of Shaftesbury to the Lord Chief Baron, it being the opinion of the court that, although the declaration made by the late I Lord Chancellor that the right of guardianship did belong to the Lord Chief Baron as surviving guardian, and the order made thereupon, was ever so erroneous, yet that the same was a good order until reversed, and consequently it was a contempt to break it.

On May 15 the three Lords Commissioners, having heard the matter argued by counsel on both sides, gave their judgment which was delivered by the Lord Commissioner Jekyll, that the court were all of opinion that the sequestration against the Countess of Shaftesbury ought to be made absolute.

LORD COMMISSIONER JEKYLL said: The marriage of a ward without the consent of the guardian is a ravishment of the ward, 2 Co. Inst. 440, and aggravated in this respect that after such ravishment by marriage the ward cannot be restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher. By the Statute of Westminster 2, c. 35, is is enacted that if one is guilty of ravishment, either of a male or female ward, if the ward is restored, although not married, the ravisher shall be punished with two years' imprisonment, but if the ward is not restored, or if he is restored and is married, the party guilty of such ravishment (if he cannot make satisfaction for the marriage) shall be punished by imprisonment for life or by abjuring the realm at the discretion of the court where he is tried, so that a ravishment of a ward became an offence not only against the guardian, but against the King, and whereas, on the ward's being married, the ravisher was to be punished by perpetual imprisonment or by abjuring the realm, this shows the greatness of the offence by the grievousness of the punishment. The matter of marrying infants without the proper consent of guardians is provided against, both at law and in this court, especially the latter, it being notorious that a court of equity entertains no greater jealousy of, nor shows more resentment against anything, than the unlawful marriage of infants.

In the case of the marriage of a lunatic, viz., that of Mr. Packer's marrying Mrs. Ash (see *Packer* v. *Wyndham* (2)), the court committed Mr. Packer, the parson, and others that were their agents, and Packer continued in custody for a considerable time. Infants and lunatics may be compared together, both of these being unable to take care of themselves. Where an infant is committed by the court to the custody or care of anyone, such committee gives a recognisance that the infant shall not marry without leave of the court, which form is very rarely altered and on special circumstances, so that, if the infant marries, though without the privity, or knowledge, or neglect of the committee, yet the recognisance is in strictness forfeited, whatever favour the court upon application may think fit to show to such committee when he appears not to have been in fault. In Lord Somer's time, Mr. Goodwin married an infant (Mrs. Knight) and was committed, and this commitment was followed by an Act of Parliament dissolving the marriage.

So, in 1713, in *Hannes* v. *Wough* (3), Sir Edward Hannes's daughter and heir, who was an infant, being inveigled from her guardian Dr. Wough and married to one Willis, although Mrs. Hannes was not taken from a guardian assigned by the court, yet, in that case, both Mr. Willis, and the parson, and the agents, were all committed by Sir John Trevor, M.R., and the order afterwards confirmed by Lord Harcourt, L.C. As this court punishes the instruments where such marriage is had without the consent of the guardian, so, if there is only an apprehension that the infant will be married unequally, either by the guardian or by his neglect, a court of equity will interpose, send for the infant, and commit him to the custody of a proper person or relation in order to prevent such danger, as was done in the case of the infant Lady Catherine Annesley by Lord Harcourt, L.C., and likewise in another case, that of Mr. Vernon of Staffordshire, by Lord Macclesfield, L.C.

The present case is still of a higher nature, as it is the case of a peer of the realm in whose education the public is interested, and where the guardianship of him is devised by a peer of the realm, by the will of the late Lord Shaftesbury.

As to the objection that has been made to the order of this court, that there are no words therein that the infant shall not be married without the consent of the guardian, the court could not suppose, or foresee, that any person would marry the infant without the guardian's consent and for that reason there was no express provision against it in the order, but still the prohibition is implied that no person, without the leave of the guardian, should marry this infant. Besides, by the same reason that these words ought to be inserted, the order should likewise have provided that no person should take away or ravish this ward from the guardian, etc., all which things are surely implied, but, further, it is a sufficient

A answer to this objection that such negative words are never inserted in the order.

It is objected that here is no disparagement in this marriage, forasmuch as the birth of the noble lady to whom Lord Shaftesbury is married, and also her quality, are equal to those of her husband, and she has had the advantage of being educated under the Countess of Gainsborough, her mother, a lady of great honour, virtue B and quality. Admitting all this to be so, yet it may be reasonably supposed that, if the infant earl had stayed until he had attained his age, and could have made a jointure and settlement, in such case his lordship might have had a better portion. But in reality, though there be no disparagement, yet this is only by way of extenuation and can never be urged as a justification, for it is the marriage without the consent of the guardian that constitutes the offence, so that such C marriage having been to one of equal degree and fortune, can at most tend but to extenuate. It is observable that the disparagement of the ward was not where such ward without the guardian's consent married one of inferior degree, as a villein, citizen, or burgess, but where the guardian himself married the ward to one of inferior degree, for which see the Statute of Merton, 1235 [repealed by Statute Law Revision Act, 1863]; 2 Co. Inst. 89, 92.

D It has been argued that the punishment of this ravishment of ward by sequestration, or otherwise, would be fruitless, since the marriage having been once solemnised and perfected, the same cannot be afterwards rescinded or dissolved. The like objection might be made though the marriage were ever so much to the disparagement of the ward, but in all these cases the reason of inflicting punishments is for example's sake, and to deter others from the like offence of ravishment of E wards.

A further objection—this marriage is by the countess the mother of the infant earl, who is guardian by nature and nurture, and so cannot be guilty of ravishment of ward. The right of a testamentary guardian takes place of a guardianship by nature. By the express words of the Act of Parliament the guardian by will takes place of all other guardians, and his authority, by that law, is a continuation of F the paternal authority.

It is said that there is no case where a complaint has been against an infant's mother, for taking away her own child. But Lords Selkirk and Orkney, guardians of the infant Duke of Hamilton, petitioned against the Duchess of Hamilton for taking away the infant duke out of their custody and their complaint was received, upon which the court would have proceeded against the mother, but the guardians G could not make out their right of guardianship by reason of some defect in the instrument under which they claimed.

All these objections being answered, the court are of opinion that the sequestration against the Countess of Shaftesbury ought to be made absolute. The case of Lady Gainsborough seems to differ. Here the question is whether the Countess of Gainsborough's consenting that her daughter should be married to the infant H earl be not a contempt.

In Y.B. 8 Edw. 3, fo. 52, pl. 41, the case was that a writ of ravishment of ward was brought against four men and a woman. The men took away the ward, and the woman, knowing that the four men had taken away the ward, married the ward to her daughter. Herle, C.J., gave the rule that the woman was equally guilty with the four men of the ravishment of the ward, the marriage of the infant without I the consent of the guardian constituting the offence; and although the guardian is not appointed by the court, nor any commitment made by the court of the infant, yet have those been punished who have married the ward without the consent of the guardian, as appears from the above cited case of *Hannes* v. *Wough* (3), where the case was nothing more than that of marrying the infant without the consent of the testamentary guardian, and the decree was only for an account of Sir Edward Hannes', the father's, personal estate and for an allowance of maintenance for the infant. In the principal case the decree goes something further, as it directs that the will of the late Earl of Shaftesbury should be performed,

part of which will is that the infant earl should be under the care and guardianship of the persons named therein. A

In *Ratcliff's Case* (4) it was resolved that every ancestor, whether male or female, might bring an action of trespass or ravishment of ward, against anyone for taking away his heir apparent, male or female, and for marrying such heir, and that it is not material, of what age such heir then was, and as the ancestor might bring such action for taking away and marrying the heir so also might the guardian B for taking away and marrying the ward.

It does not appear that the late Earl of Gainsborough left any testamentary guardians of his children so that the countess was guardian of them by nature, and the marriage of her daughter belonged to her. Consequently, it is to be presumed that she married her daughter to the infant earl. At least, if she did not, she may purge herself by oath. It is material, that the Lord Chief Baron Eyre, C the guardian of the infant earl, has not in his petition made any direct charge, or prayed anything against the Countess of Gainsborough, and possibly the court may not be bound, ex officio, to punish for a ravishment of a ward where there is no complaint.

The court has the care, but not the guardianship of infants, and the Lord Chief Baron Eyre is not a guardian appointed by the court, but by the will of the father, D in which respect the court is the less concerned. Although the Tenures Abolition Act, 1660, says that a testamentary guardian may maintain an action of ravishment of ward if the infant be taken from him, yet the statute does not enjoin him to do it, but refers the same to the discretion of the guardian. So that in this case, forasmuch as the testamentary guardian has not complained of or prayed any redress against Lady Gainsborough, the court will do nothing against E her, but discharge the order of sequestration with respect to her.

Now we come to the petition of the infant Earl of Shaftesbury, where it is first objected that although the court might, upon a petition, make a provisional order for the taking care of an infant, yet that they ought not to make an order determining the right of guardianship unless the matter be brought judicially before them, by bill, answer, and proofs. But in this case, here are a bill and an answer, F and both the will and the devise of the guardianship are set out by the bill, whereupon the decree says that the trust of the will shall be performed, one of which said trusts is the guardianship of the infant. It is not material that the earl was defendant, for so it was in the case of Mrs. Hannes, who was married to Mr. Willis without the consent of the guardian, and this court may, upon petition only, without any bill or decree, make an order to determine the right of guardian- G ship, in regard the care of all infants is lodged in the King as pater patriæ, and by the King this care is delegated to his Court of Chancery.

In Fitzherbert's Natura Brevium, 232, the King is bound of common right and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King's protection, for which reason it is that idiots and lunatics, who are H incapable of taking care of themselves, are provided for by the King as pater patriæ, and there is the same reason to extend this care to infants. This is the reason given in the writ de idiota inquirendo, which the King issues out to take care of him, who regimini sui ipsius, et honorum, et terrarum suarum minime sufficit, which reason also appears in the writ de lunatico inquirendo, and in *Beverley's Case* (5) infants, as well as idiots, are said to be under the care and I protection of the Crown, as persons equally unable to take care of themselves. In like manner, in the case of charity, the King pro bono publico, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses [Charitable Uses Act, 1601] and antecedent to it as well as since, it has been every day's practice to file informations in Chancery in the Attorney-General's name for the establishment of charities. Also in *Viscount Falkland* v. *Bertie* (6), Lord Somers, in delivering his opinion, takes

notice that several things are under the care and superintendency of the King as he is pater patriæ, and instances charities, idiots, lunatics, and infants.

Several Acts of Parliament have made alterations in some cases of this nature, which so far stand altered and no further, but unless there be express words in an Act for that purpose the original jurisdiction of this court remains as before. There is not any one Act that has taken away the original jurisdiction of this court with respect to this care and superintendency in the case of infants, charities, idiots and lunatics. Since the statute which took away the court of wards, the jurisdiction of wardship returns to the Court of Chancery, and it appears by the Register, 21 b, 198, that a writ may issue out of this court to remove the guardian of an infant, and to put another guardian in his stead.

The law is particularly favourable to and careful of an infant's interest, and, although the infant himself cannot bring an account against the guardian until his coming of age, yet a third person may bring a bill for an account against the guardian, even during the minority of the infant. So in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age. Lord Somers has often said that this court should be always open for petitions, and orders on petitions in regard to the guardianship of infants have not only been provisional, but in some cases decisive, as to the right of guardianship. Thus in *Lady Teynham* v. *Lennard* (7), there was no bill depending in this court, but only a petition desiring that Lady Teynham, the mother, being a papist, might not have the guardianship of the infant determined on petition against the mother, upon which an appeal was brought to the House of Lords before whom it was never objected, nor once thought of, that this court could not on a petition only determine the right of guardianship, and on the appeal the Lords also determined the right against the mother. Also in the case of a testamentary guardian, such guardian having a plain legal right upon the words of the will, and the whole case arising thereon, there can be no need of a bill in equity, no proofs of either side are requisite, or can avail, and, therefore, the matter is properly determinable upon a petition without a bill.

In the last place it is objected that upon the wording of this will the Lord Chief Baron has no right to the guardianship, the same being devised to him and two others, without saying "and to the survivor of them," and that this is a joint personal confidence wherewith three are entrusted, wherefore by the death of any one, the guardianship is determined. To prove that a guardianship is personal, it has been urged that it is not assignable, nor will it go to executors or administrators. I admit a guardianship is not assignable, neither will it go to executors or administrators, but for all that it is coupled with an interest and is not a naked authority. I admit also that it has been said, that where a naked authority is given to two, if one dies, the survivor cannot act, but the same book, 1 Co. Inst. 112, 113, says that where an authority is coupled with an interest, it does survive. In *Bedell* v. *Constable* (8) (Vaugh. at p. 182) the case of a guardian is compared with that of an executor or administrator which is not assignable but yet survives, and although a guardian is not in all respects to be compared with an executor in regard the latter may continue his executorship by appointing an executor by his will, yet the case of a guardianship devised to two is strictly like the case of an administration granted to two (especially where the debts amount to as much as the assets), for in that case as well as in the case of two guardians, an administrator cannot assign his administratorship. It will not go to his executors or administrators, but to the surviving administrator; and such an administrator is accountable to the creditor for everything, as much as the guardian is to the infant. Such an administrator can make no profit. That a guardianship is coupled with an interest is most apparent in that a guardian may bring an action and avow in his own name, may make leases during the minority of the infant, and may grant copyholds even in reversion, as dominus pro tempore.

A guardianship is not properly an office, nor to be compared (for instance) with the office of a park-keeper, for the former has an interest in the infant's estate.

but a park-keeper has no right or interest in the park or land enclosed therein, and the owner of the land may determine such office by disparking the park, or killing the deer. Whereas in *Crabbe* v. *Tooker* (9) it is said that where Lord Gray committed the custody of his son to four and one of them died the authority determined. This case is put upon the clause of the Abduction Act, 1557, which says

> "that whosoever takes a damsel unmarried, and under the age of sixteen, out of the custody of their father or mother, or any such person to whom the father in his lifetime, or by his will, or by any act in his lifetime has appointed the same, shall be subject to the pain of two years' imprisonment, or to the payment of such fine as the court shall appoint."

So that by that Act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee had not the like interest as the guardian has. He had but a bare authority.

As to *Curle's* (*Auditor*) *Case* (1), that depended upon the statute 32 Hen. 8, c. 46 [1540, relating to the Court of Wards: repealed by Tenures Abolition Act, 1660], but in the principal case, when the infant earl was so very young as not to be above a year old and the testator had appointed him three guardians, it was hardly probable that the testator himself could imagine that all those three guardians should live until the child's age of twenty-one. To say that the guardianship shall determine by the death of any one of the guardians, would be to affirm that the more care the father takes of the child's education the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more of them were appointed by the father the less likelihood there would be that they all should live till the child should arrive to twenty-one.

LORD COMMISSIONER GILBERT was of the same opinion, observing, further, that the Court of Chancery had an original jurisdiction of the right of guardianship, and as formerly the lord by priority, i.e., that lord of whose manor the lands which were first in the family were held had a right to the guardianship, so the Court of Chancery could determine touching that priority. Although tenures in chivalry be taken away, yet the jurisdiction which the King had, as pater patriæ, remained.

It appears from Bracton, lib. 3, c. 9, Fleta, c. 2, and Staunford, fo. 37, that the King is protector of all his subjects; that in virtue of his high trust he is more particularly to take care of those who are not able to take care of themselves, consequently of infants, who by reason of their nonage are under incapacities. Hence natural allegiance arises as a debt of gratitude which can never be cancelled, although the subject owing it goes out of the kingdom or swears allegiance to another prince. It has been objected that this is a matter of right, and must be determined by a decree on bill and answer.

Possibly, then, it will be too late, and when this right depends upon the plain words of a will, why should the infant be delayed or put to the charge of a decree? This is an authority coupled with an interest, and no pretence that the guardians are obliged to act jointly. The actions given by the law plainly show that the guardian has an interest. The remedies are, first, trespass if one takes away the ward, and the guardian has got possession of him again, or if the ward is still detained, then a writ of ravishment of ward.

As to the objection that the guardian can make no profit of his guardianship, if this be for the service of the family (as surely it is), why should it not be as valuable as if the same could have been turned to his own advantage? The father may bring an action against any person for taking away his heir, and so might any ancestor against any person except against the lord of whom the lands were held in chivalry before such tenure was wholly taken away.

The case referred to in *Crabbe* v. *Tooker* (9) was only where the parties having the custody of the infant given to them were invested with a bare authority for a

particular purpose, and so the death of one of the guardians determined this joint authority, whereas the statute of 12 Car. 2 [the Tenures Abolition Act, 1660] (which was drawn by Sir Matthew Hale, C.J.), gives the guardian an authority coupled with an interest. Such testamentary guardian takes place of all other guardians, and his interest is for the good and honour of the family; as the father was the head of the family, so the statute puts him in loco patris.

Wherefore, he agreed with Lord Commissioner Jekyll in toto, as did also **LORD COMMISSIONER RAYMOND.**

LECHMERE *v.* EARL OF CARLISLE AND ANOTHER

[Rolls Court (Sir Joseph Jekyll, M.R.), Michaelmas Term, 1733]
[Reported 3 P.Wms. 211; 2 Eq. Cas. Abr. 31; 24 E.R. 1033]

[Lord Chancellor's Court (Lord Talbot, L.C.), Easter Term, 1735]
[Reported Cas. temp. Talb. 80; 3 P.Wms. at p. 224; 2 Eq. Cas. Abr. 501; 25 E.R. 673]

Equity—Conversion—Money agreed to be laid out in land treated as land—Land agreed to be sold considered as personal estate—Fund agreed to be laid out in land retained by covenantor.

The equitable maxim that what ought to have been done, or has been agreed to be done, shall be taken as done is so powerful as to be capable of altering the nature of things, so that money agreed to be laid out in land is to be treated as land and land agreed to be sold is to be considered personal estate. It matters not whether the money agreed to be laid out in land be deposited with trustees or retained by the covenantor.

Per Lord Talbot, L.C.: Lord L. [the covenantor in the present case] was bound at the time of his death to lay out this money in land, by which he gained a right to an estate for life with a remainder in fee, and, the estate for life being determined by his death, the right which he had to the remainder descends upon his heir.

Notes. Considered: *Sanders* v. *Sanders* (1739), West temp. Hard. 686. Distinguished: *Ellinor* v. *Garton* (1745), 9 Mod. Rep. 480. Considered and Applied: *Deacon* v. *Smith* (1746), 3 Atk. 323. Considered: *Pulteney* v. *Darlington* (1783), 1 Bro.C.C. 223. Followed: *Sowden* v. *Sowden* (1785), 1 Bro.C.C. 582. Applied: *Tubbs* v. *Broadwood* (1831), 2 Russ. & M. 487. Considered: *Cogan* v. *Stephens* (1835), 5 L.J.Ch. 17. Followed: *Barham* v. *Clarendon* (1852), 10 Hare, 480. Considered: *Re Jones, Williams* v. *Rowlands*, [1947] 2 All E.R. 716. Referred to: *Wrighton* v. *A.-G.* (1737), West temp. Hard. 480; *Devese* v. *Pontet* (1785), 1 Cox, Eq. Cas. 188; *Russell* v. *Smythies* (1786), 1 Cox, Eq. Cas. 215; *Wilson* v. *Piggott*, [1775–1802] All E.R.Rep. 539; *Garthshore* v. *Chalie*, [1803–13] All E.R.Rep. 239; *Perry* v. *Philips* (1810), 17 Ves. 173; *Wrighton* v. *Macauley* (1845), 4 Hare, 487; *Mathias* v. *Mathias* (1857), 3 Sm. & G. 552; *Re Lancey* (1869), L.R. 4 Exch. 345; *Re Ffennell's Settlement, Re Ffennell's Estate, Wright* v. *Holton*, [1918] 1 Ch. 91; *Re Rawlinson, Wilson* v. *Banks* (1934), 78 Sol. Jo. 602.

As to the equitable doctrines of conversion and performance, see 14 Halsbury's Laws (3rd Edn.) 576–588, 609–611. For cases see 20 Digest (Repl.) 354 et seq., 521 et seq.

Cases referred to:

(1) *Best* v. *Stamford* (1705), 1 Salk. 154; 91 E.R. 141; 20 Digest (Repl.) 356, *811.*

(2) *Kettleby* v. *Atwood* (1684), 1 Vern. 298, 471.
(3) *Lancy* v. *Fairechild* (1689), 2 Vern. 101; 23 E.R. 675; 20 Digest (Repl.) 395, *1157*.
(4) *Lawrence* v. *Beverleigh* (1671), 2 Keb. 841; 84 E.R. 532; 23 Digest (Repl.) 336, *4015*.
(5) *Knights* v. *Atkyns* (1687), 2 Vern. 20; 2 Rep. Ch. 400; 23 E.R. 624; 20 Digest (Repl.) 394, *1156*.
(6) *Symons* v. *Rutter* (1691), 2 Vern. 227; Prec. Ch. 23; 23 E.R. 747, L.C.; 20 Digest (Repl.) 369, *913*.
(7) *Whitwick* v. *Jermin* (prior to 1688), cited in 2 Vern. 58; 23 E.R. 646; 20 Digest (Repl.) 395, *1161*.
(8) *Chichester* v. *Bickerstaff* (1693), 2 Vern. 295; 23 E.R. 791; 20 Digest (Repl.) 423, *1444*.
(9) *Lingen* v. *Sowray* (1715), 1 P.Wms. 172; Prec. Ch. 400; 10 Mod. Rep. 38; Gilb. Ch. 91; 1 Eq. Cas. Abr. 175; 24 E.R. 343; sub nom. *Shorer* v. *Shorer*, 2 Eq. Cas. Abr. 327 L.C.; 20 Digest (Repl.) 392, *1133*.
(10) *Edwards* v. *Countess of Warwick* (1723), 2 P.Wms. 171; 2 Eq. Cas. Abr. 42; 24 E.R. 687, L.C.; affirmed sub nom. *Countess of Warwick* v. *Edwards*, 1 Bro. Parl. Cas. 207, H.L.; 20 Digest (Repl.) 356, *823*.
(11) *Holt* v. *Holt* (1694), 2 Vern. 322; 1 Eq. Cas. Abr. 274, pl. 11; 23 E.R. 808; 24 Digest (Repl.) 673, *6621*.
(12) *Vernon* v. *Vernon* (1731), 2 P.Wms. 594; 24 E.R. 875, L.C.; affirmed 1 Bro. Parl. Cas. 267, H.L.; 40 Digest (Repl.) 530, *399*.
(13) *Wilcocks* v. *Wilcocks* (1706), 2 Vern. 558; 23 E.R. 961; 20 Digest (Repl.) 522, *2337*.
(14) *Goodfellow* v. *Burchett* (1693), 2 Vern. 298; 23 E.R. 792; 20 Digest (Repl.) 514, *2225*.
(15) *Cuthbert* v. *Peacock* (1707), 1 Salk. 155; 2 Vern. 593; 1 Eq. Cas. Abr. 204; 91 E.R. 143, L.C.; 20 Digest (Repl.) 508, *2154*.
(16) *Cranmer's Case* (1701), 2 Salk. 508; 91 E.R. 434, L.C.; 20 Digest (Repl.) 508, *2165*.
(17) *Chaplin* v. *Horner* (1718), 1 P.Wms. 483; 24 E.R. 483; 20 Digest (Repl.) 394, *1153*.

Bill brought by the nephew and heir of the deceased Lord Lechmere to compel a specific performance of marriage articles.

On the marriage of Nicholas, the late Lord Lechmere, with the Lady Elizabeth Howard, the second defendant, one of the daughters of the defendant, the Earl of Carlisle, articles were entered into, dated April 30, 1719, whereby, reciting the intended marriage, the Earl of Carlisle covenanted to pay to Lord Lechmere £6,000 as the portion of his daughter, and Lord Lechmere covenanted for himself and his heirs with certain trustees within a year after his marriage to lay out the said £6,000 and £24,000 of his own money in the purchase of freehold lands and tenements in fee simple in possession in the south part of Great Britain with the consent of the Earl of Carlisle and Lord Morpeth, their executors and administrators, the lands when purchased to be settled to the use of the Lord Lechmere for life sans waste, remainder to trustees and their heirs during his life to support contingent remainders, and after the Lord Lechmere's death, in trust to pay £800 per annum, clear of all charges (except Parliamentary taxes) to the defendant, Lady Elizabeth Howard, his then intended wife, for her jointure, and after the determination of these respective estates remainder to the first son of the marriage in tail male, remainder to trustees for 500 years to raise portions for daughters of the marriage, remainder to the Lord Lechmere in fee. The 500 years' term was to be void if there was no daughter, and until the purchase was made the interest was to be paid to the parties who would have been entitled to the rents and profits of the land when purchased at the rate of £5 per cent. The marriage took place, and Lord Carlisle paid £4,000, part of the portion, to Lord Lechmere, and gave his

A bond for the remaining £2,000 which had also been since paid to the defendant, Lady Lechmere.

Lord Lechmere was seised of some lands in fee at the time of the marriage of about £300 per annum, and after his marriage he purchased some estates in fee of about £500 per annum, and some estates for lives, and other reversionary estates in fee expectant on lives, and contracted for the purchase of some estates B in fee in possession. On June 18, 1727, he died intestate without issue and without having made a settlement of any estate. None of the purchases or contracts was made by Lord Lechmere with the consent of the trustees. Mr. Lechmere, his nephew and heir, brought this bill to have a specific performance of the articles, and the £30,000 laid out as therein was agreed, and to have interest at the rate of £5 per cent. in the meantime.

C The defendants in their answer contended that Lord Lechmere intended only a provision for the lady and the issue of the marriage, and, the plaintiff claiming under the limitation of the remainder in fee to the right heirs of Lord Lechmere, the articles as to him were voluntary, and, therefore, ought not to be carried into execution in his favour to the prejudice of the widow and next-of-kin; the whole real estate of Lord Lechmere, or at least so much as was purchased or contracted D for after the marriage, should be subject to the lady's jointure of £800 per annum; and the whole £30,000, with the rest of the personal estate, should be distributed according to the statute.

Cur. adv. vult.

SIR JOSEPH JEKYLL, M.R., delivered the following opinion: The question E upon these articles is whether the heir-at-law is entitled to have this £30,000 taken out of the personal estate and invested, pursuant to the articles, or, in other words, whether the same is to be taken as land. I hold that it must, for these reasons: (i) for that Lord Lechmere was compellable in equity to lay out this £30,000, and settle it agreeably to the articles; (ii) because Lord Lechmere living after the year within which time the purchase was to be made and settled had broken his F covenant; (iii) for that in consequence thereof the trustees might have brought their bill and have compelled his lordship in his lifetime to make such purchase and settlement; (iv) for that the trustees not commencing their suit in equity or at law shall not prejudice any person entitled to have this settlement made; and, (v) in regard the land descended, which was under the value of what Lord Lechmere was bound to settle, shall not be taken for or towards a satisfaction of the G lands articled to be settled.

With respect to (i), it is most plain and according to the express words of the articles that Lord Lechmere was bound to lay out the sum of £30,000 in the purchase of freehold lands in fee simple, and to settle them pursuant to the articles, and this within a year after the date of the articles. This seems so evident, that nothing will be attempted to be said against it.

H As to (ii), it seems almost equally clear, that Lord Lechmere's not having made this purchase and settlement within a year was a breach of his covenant. It has, indeed, been objected that something was to be done previously by the trustees, viz., that they were to consent, but my opinion is that the trustees were not to do the first act. Lord Lechmere ought to have proposed his purchase and settlement upon which the trustees were to have signified their agreement or disagree- I ment thereto. It is not pretended that his lordship made one single step towards this settlement; consequently, he had broken his covenant.

As to (iii), the covenant being thus broken by Lord Lechmere, the trustees might either have brought an action at law on the covenant or a bill in equity to have compelled a specific performance thereof. The wife's fortune had been advanced, viz., £4,000 in money, and £2,000 secured by bond, so that the trustees had plainly this power, but it is probable they thought all was safe, and that Lord Lechmere was well able (as, indeed, he was) to make a purchase, and that, in the meantime, it would be more beneficial to him to receive the interest of the money

than the profits of the land. If the trustees had, after the expiration of the year, filed their bill for an execution of these articles, a court of equity would, and must, have decreed a performance.

And taking this to be so, as to (iv) the forbearance of the trustees in not doing what it was their office to have done shall in no sort prejudice the cestuis que trust, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons, which can never be maintained. Wherefore the rule in all such cases is that what ought to have been done shall be taken as done, and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money. Thus money articled to be laid out in land shall be taken as land and descend to the heir, and, on the other hand, land agreed to be sold shall be considered as personal estate: *Best* v. *Stamford* (1) (1 Salk. at p. 154).

It has been objected that there is a difference between money being deposited in the hands of trustees to be invested, and where there is no such deposit, but a man covenants (as here) to lay out so much money in land, and to settle it. But, as to this, there is no manner of difference in reason, for the nature of the thing is changed by the agreement of which it is the business of a court of equity to enforce an execution. In *Kettleby* v. *Atwood* (2), it was agreed by marriage articles that, the wife having £1,500 portion, the husband should add £500 more to it, and that the whole should be deposited in trustees' hands until a convenient purchase could be found for investing the same in land, which, when purchased, should be settled on the husband and wife for their lives, with remainder to their first son in tail, remainder to their daughters in tail, remainder to the right heirs of the husband. Before the making of the purchase the husband died, leaving issue by his wife a daughter who died about a month old. The wife administered to the husband and daughter, and the heir of the husband brought his bill to have the money laid out in the purchase of land to be settled on the wife for life only, remainder to the plaintiff in fee. Although Lord Keeper North refused to make a decree for that purpose and dismissed the bill, but without costs, yet the party did not think fit to rest there, but re-heard the cause before Lord Jeffreys, L.C., who decreed for the heir, holding that the money was bound by the articles and should be for the benefit of the heir as the land would have gone if purchased. This case is in point, and the determination often allowed to be right, wherein it is observable that but part of the money, viz., that of the wife, was in trustees' hands, the husband not having deposited the £500 which he was to advance, and yet no difference was taken with regard to the two sums. Also, there was a failure of issue of the marriage, as here, and the dispute between the wife, the administratrix of the husband, and the collateral heir, who was as much a volunteer as the remainderman in the principal case, and equally out of the consideration of the articles. Notwithstanding which the decree was as above, taking the money to be as land as well with regard to the collateral heir, as to the issue of the marriage.

So in *Lancy* v. *Fairechild* (3), money by marriage articles was to be laid out in land and settled on the husband and wife and their issue, remainder to the heirs of the wife. The wife died in the lifetime of the husband and it was decreed for the heir of the wife against her administrator, the money being said to be bound by the articles agreeably to the resolution in *Kettleby* v. *Atwood* (2), although no money appeared to have been deposited and an execution of the agreement was asked by the collateral heir-at-law who could not be within the immediate view and prospect of the articles. Indeed, this is no more than what even courts of law have come into, for which reason, when money by a marriage agreement is articled to be invested in land, that money is held not to be assets for payments of debts according to *Lawrence* v. *Beverleigh* (4), where money secured by a mortgage to which an executor was legally entitled, yet, being articled to be laid out in land, and settled on the issue of the marriage, it was by Sir Matthew Hale, C.J., on a special verdict adjudged to be bound by the articles.

Knights v. *Atkyns* (5), is still stronger to this purpose. Upon marriage articles

£1,500 was the wife's portion to which the husband was to add £1,500. The whole £3,000 was to be invested in land and settled on the husband for life, remainder to the wife for her jointure, remainder to the heirs of their two bodies, stopping short there and not expressing where the estate should go afterwards. The husband died without issue, upon which his collateral heir brought his bill to have the money laid out in a purchase of land to be settled on the wife for life, remainder to the plaintiff in fee as heir-at-law of the husband. The objection was that it was reasonable the remainder in fee should go to the right heirs of the survivor, and, consequently, that the wife, having survived, was entitled, or at least, that she had a good claim, to her own £1,500 or the land to be purchased therewith, but for the heir of the husband it was answered, that this must be taken as if the bill had been brought in the lifetime of the husband and wife when the court would have decreed the remainder in fee to the husband. Accordingly, the LORD JEFFREYS, L.C., decreed the whole money to the heir of the husband on a presumption that it was so intended. Here, then, the heir of the husband was allowed to go away with the fee, although no money had been deposited in the hands of trustees, although the heir was out of the consideration of the articles, and although there was no express limitation to the heirs of the husband, which I take to have been a right decree.

In *Symons* v. *Rutter* (6), it was agreed by marriage articles that £500 of the wife's portion should be lodged with Sir Francis Child and William Pain to be placed out at interest until it could be invested in a purchase with the consent of the wife and her then intended husband of houses or lands of inheritance to be settled on the husband and wife for their lives, remainder to the heirs of their two bodies, remainder to the heirs of the body of the wife, remainder to the wife's brother in fee. The £500 was deposited in the hands of trustees; before any purchase made the wife died without issue; and the husband having afterwards received the interest during his life, died. Upon this the wife's brother brought his bill for this money, by virtue of the remainder in fee limited to him as brother and heir of the wife, and also as having administration to her de bonis non administered by the husband, who survived the wife. SIR JOHN TREVOR, RAWLINSON, and HUTCHINS were at that time Lords Commissioners of the Great Seal, the two former of whom held that, the £500 being to be looked on as money and not as land, belonged to the defendant as administrator of the husband; that it was not in all events to be laid out in a purchase, but only by consent of the husband and wife, who, it did not appear, had ever consented; and, if it had been invested, and a settlement made, the husband, as tenant in tail, might have barred it by a recovery. On the contrary, HUTCHINS conceived that this £500, being money agreed to be laid out in land, was to be taken as land, that it was plain, after the death either of the husband or of the wife, it was to be looked upon as land, and the purchase might have been made during the life of the survivor; that by the articles the survivor was entitled to the interest only during his life and until the purchase made; and, having no issue, he could be but tenant in tail after possibility of issue extinct; that, to him, this case seemed to be governed by the rule that had been taken in the several cases of *Whitwick* v. *Jermin* (7), *Lawrence* v. *Beverleigh* (4), and *Kettleby* v. *Atwood* (2), and must not, upon the same circumstances, be deemed personal estate which in other cases had been looked on as land and gone as real estate. In this last case, I observe, it was admitted that, if there had not been the clause in the articles that the purchase should be made with the consent of the husband and wife, it must have been taken as land. Such a clause makes no manner of difference, for, upon a convenient purchase being proposed, the court would have taken on themselves to judge thereof, and, without some reasonable objection made, would have ordered the money to be laid out in it so that the clause seems to have been immaterial in the marriage articles, and as if omitted, and the opinion of HUTCHINS to have been well grounded.

Against this there has been objected *Chichester* v. *Bickerstaff* (8), where, upon Sir John Chichester's marrying the daughter of Sir Charles Bickerstaff, Sir Charles

articled to pay £1,500 as part of his daughter's portion, which, together with £1,500 more to be advanced by Sir John Chichester, was, within three years after the marriage, to be invested in land and settled on Sir John Chichester for life, remainder to his intended wife for life, remainder to their first son in tail male, remainder to the daughters in tail, remainder to the right heirs of Sir John the husband. Within a year after the marriage, Sir John and his lady both fell ill of the smallpox. The wife died first, and three days after Sir John died without issue, having made his will and appointed his sister, Frances Chichester, his residuary legatee. Sir Arthur Chichester, the brother and heir, brought his bill claiming the money thus agreed to be laid out in land, the remainder in fee whereof, in case of failure of issue of the marriage, was to go to the heir of the deceased husband. Sed per curiam this money which would have been land as to the issue of the marriage, yet, now the husband and the wife were dead without issue, was turned into money again, and under the power of the husband to dispose of as he pleased. It should have gone to his administrator, had there been no will; a fortiori will it, in the present case, go to his residuary legatee. With respect to this case, it is remarkable that the wife died within three years after the marriage, during which period the purchase was to be made, so that the time was not come within which the money was to be laid out, and until then it continued money, or, possibly, the court had some evidence to induce them to believe Sir John Chichester looked on the money as personal estate. If this does not distinguish it from the other cases, I doubt, in opposition to so many decrees, the resolution here given would hardly be maintainable.

Afterwards came *Lingen* v. *Sowray* (9), where £700 of the husband's money and £700 of the wife's money was, on a marriage, articled to be laid out in land and settled on the husband for life, remainder to the wife for life, remainder to the first son in tail male, remainder to the daughters in tail, remainder to the heirs of the husband. The husband devised all his personal estate to his wife, and all his real estate to the plaintiff, and died without issue. Whereupon it was decreed that the money articled to be laid out in land was as land and could not pass by the devise of the personal, but belonged to the plaintiff as devisee of the real estate. This decree, first made by Lord Harcourt, L.C., in 1711, was affirmed in 1715, by Lord Cowper, L.C.

Still later than this case was *Edwards* v. *Countess of Warwick* (10), decreed in Chancery and affirmed in the House of Lords, where money was articled to be laid out in land and settled on the husband and wife, and the issue of the marriage, remainder to the heirs of the husband. There was issue, but such issue died without issue before the money was laid out. It was decreed that the money was to be looked upon as land and should go to the heir. Neither is the objection that the plaintiff is a volunteer of any weight, for this is the case of a trust, and every cestui que trust, whether a volunteer or not, or be the limitation under which he claims, with or without a consideration, is entitled to the aid of a court of equity in order to avail himself of the benefit of the trust. There can be no reason that the trustee should retain to his own use the trust money or estate, with respect to which he is barely an instrument, in breach of the confidence reposed in him. Any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt. Indeed, if the bond be merely voluntary, a real debt, though by simple contract only, shall have the preference, but if there be no debt at all, then a bond, however voluntary, must be paid by an executor. Besides, in some cases this court may be under a necessity of determining questions between volunteers—I mean between persons that are really such with regard to those from whom they claim, as where the heir comes to have his real estate disencumbered by applying the personal estate in exoneration thereof. There the objection of being a volunteer is strong against the plaintiff, and yet the court of equity must determine the point.

In *Holt* v. *Holt* (11), the father of J.S. articled with a carpenter to pay him £1,000 for the building of a house upon his land, and the carpenter articled with

A the father to build the house. The father died intestate before the house was begun to be built and the land on which the house was to be built descended to the son and heir. It was held that the son might compel the widow and administratrix of the husband, who owned the ground on which the house was to be built, to lay out the £1,000 in building the house, although the son, who sought and was allowed to take the benefit of this covenant, did not entitle himself thereto by B any manner of consideration. So, in *Vernon* v. *Vernon* (12), decreed first by the LORD KING, L.C., and affirmed in the House of Lords. A. covenanted on his marriage to lay out £7,000 in land, and settle it on himself for life, remainder to his wife for life, remainder to the first son of the marriage in tail male, remainder to the heirs male of the body of A., remainders to A.'s brother for life, remainder to his first son. Although this remainder seemed merely voluntary and C out of all the considerations of the marriage settlement, and although A. (as was there well urged), had the land been settled by him in his lifetime, might have barred the brother by a common recovery, yet, on A.'s leaving only daughters, equity compelled a specific performance of the covenant.

There remains only the last point, which is whether the lands which descended from Lord Lechmere to his heir-at-law shall be taken for or towards a satisfaction D of the covenant as to this remainder limited to his own right heirs. It is objected that Lord Lechmere covenants for himself and his heirs to lay out £26,000 in the purchase of lands, and to settle the same on himself and wife and first son, and for portions for daughters, remainder to his own right heirs. So that in this case the heir is debtor, as bound in the covenant, and yet claims as a creditor under the covenant, and it is inconsistent for the same person to be both debtor and E creditor, and as far as the heir has real assets the assets are at home already and cannot be sued for. If a man articles for a purchase, and binds himself, his heirs, executors, etc., he may as well be called in that case covenantor and covenantee as in the present, and yet, in respect of the different rights that are in him, the heir may compel the executor to complete the purchase for him. Although, to speak properly, the heir-at-law cannot be considered as a creditor any more than F as a purchaser under his ancestor, but as heir he is the representative of his ancestor so as to be entitled to all the real estate which the ancestor died seised of, and, on the other hand, liable to answer all the burdens to which such real estate is subject.

With regard to the lands left to descend, (i) it is plain that the covenant does not relate to the lands which were his lordship's at the time of entering into the G articles, the words being future, viz., that he would purchase lands; (ii) the purchase of the leasehold estates for lives or reversions expectant on estates for lives, are nothing to the purpose, since the lands to be bought are expressly mentioned to be lands of inheritance and in fee simple, whereas these could not answer the intent of the articles. Indeed, what ought to govern in all these cases of implied satisfaction is the intention of the parties. In the principal case the H intention of the party does not plainly appear, that his estate which he permitted to descend, and which did not amount to the value of what he articled to purchase, should be for or towards a satisfaction. Consequently, this would be to disinherit an heir by an implication not necessary, contrary to the known maxim of law.

As to *Wilcocks* v. *Wilcocks* (13), where a man upon his marriage covenanted to purchase lands of £200 per annum and to settle them on himself for life, I remainder to his wife for life, for her jointure, remainder to his first son in tail male, remainder to his daughters in tail, and the father purchased lands of £200 per annum, after which he made no settlement, but permitted them to descend, whereupon this was decreed to be a satisfaction of the covenant, here the father made a purchase fully sufficient to answer the £200 per annum. The book takes notice that the lands were worth £200 per annum, which imports that they were just of that value, and this plainly shows that the lands were bought with an intention to satisfy the covenant, and the eldest son could not complain or object, when he had his £200 per annum from his father, that it was another estate than

what was covenanted to be settled upon him, viz., that it was a fee simple instead of an entail, for which cause this seems to have been a reasonable decree. And, by the way, if the eldest son had alienated the fee and died without issue, I do not think the second son could have recovered under these articles, for if it had been an estate tail, he might have barred it by a recovery, whereas in the present case the Lord Lechmere has not permitted lands to descend to his heir to the value of what he articled to purchase, and lands of less value shall never be looked upon as an equivalent. The lands to be purchased according to the covenant are to be to the amount of £30,000, and as the lands purchased before the marriage, together with the leasehold and reversions purchased afterwards, are not to be taken as part of the lands to be bought and settled, so the rest of the purchases which he made are of very inconsiderable value, and it cannot be presumed his lordship intended they should be so construed.

In *Goodfellow* v. *Burchett* (14), a man on the marriage of his daughter gave a bond to her husband for part of the portion, after which by his will he gave her land of much greater value, and yet this was held to be no satisfaction, although there were not assets to pay debts, which is a strong case. There it is laid down as a rule that where a legacy has been decreed to go in satisfaction of a debt, it must have been grounded upon some evidence, or at least upon a strong presumption that the testator did so intend it. But in the present case there is no such evidence, nor any room for such a presumption.

In *Cuthbert* v. *Peacock* (15), it was insisted on as a rule that where a debtor gives a legacy greater than his debt it shall be intended a satisfaction, because the testator must be presumed to be just before he is bountiful. But Lord Cowper, L.C., said it might as well be presumed that a debtor, where there are assets, intends to be both just and bountiful. So in *Cranmer's Case* (16), it was decreed by the Lord Harcourt, L.C., that a legacy, although it exceeded the debt, could not be intended as a satisfaction thereof. Indeed, it may be presumed that, if the testator intended to pay or satisfy a debt, he would certainly have taken notice of it.

So that upon the whole matter I decree that this £30,000 thus agreed to be laid out in land shall be taken as land; that the land permitted to descend to the heir shall not be deemed to be in, or towards, satisfaction of the debt; consequently, that the administratrix must invest this £30,000 in a purchase and settle it pursuant to the articles. But although these provided that £5 per cent. shall be paid until a purchase made, yet, it appearing to me that the money has been placed in government funds which have yielded but £4 per cent., I think I may with reason and equity moderate the interest, and reduce it to £4 per cent. in regard the administratrix has made no more of it.

The defendants appealed to the Lord Chancellor.

LORD TALBOT, L.C.—The first question is whether the plaintiff, the heir-at-law to Lord Lechmere, is entitled to a specific performance of this covenant. It has been considered by the plaintiff's counsel as an argument of Lord Lechmere, and an intent in him to lay out this whole sum of £30,000 in lands at all events. On the other hand, the defendant's counsel have insisted that the design went no further than the providing for Lady Lechmere and the issue of the marriage. The intent seems to me to be that the £30,000 should, at all events, be laid out in land, the produce whereof was to be secured to the issue of the marriage, who in this case must have taken as purchasers, but as to the remainder in fee I do not think that the looking upon Lord Lechmere either as a purchaser of it or not will vary the case, since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved, and I think it quite the same whether he is considered as a purchaser or as a volunteer, the dispute not being between the heir and a third person, but between the two representatives of Lord Lechmere, the one of his real, the other of his personal estate. The heir being but a volunteer in regard to his ancestor, will not exclude him from the aid of this court. But, although the question is between two volunteers, the court will determine

which way the right is, and decree accordingly. We must, therefore, see whether the £30,000 is, upon this covenant, to be looked upon as real or personal estate.

It seems to be allowed on both sides that had the money been deposited in trustees' hands, it must have been looked upon as a real estate, and the heir entitled to the benefit of it. This, I say, seems to be granted, and no authority against it but what has been collected from *Chichester* v. *Bickerstaff* (8). It is probable that in that case the court went upon some reason which induced it to think that Sir John Chichester looked upon that money as personal estate, for, otherwise the authority of that case is not to be maintained, being contrary to all the former resolutions, and to a late one in the House of Lords, by which I am bound, namely, that of the *Countess of Warwick* v. *Edwards* (10), where the money was decreed to go as land, although to a collateral heir, who was not within the considerations of the settlement. So, it is now a settled point that where the securities are appropriated, the money shall go as land, not only to the issue of the marriage, but likewise to a collateral heir or general remainderman unless there appears some variation in the parties intent. Indeed, it is very reasonable that it should be so, for, otherwise the neglect of trustees or any other accident might overthrow all men's agreements and contracts entered into upon the best and most valuable considerations.

It has been objected that this case differs from all those, because the money was never deposited, but remained in Lord Lechmere's own hands and he only was the debtor. So now the question is whether this will make any difference. An heir can no more be looked upon as a creditor against his ancestor than he can be looked upon as a purchaser under him. He takes with the several burdens that his ancestor lays upon him. As, on the one hand, Lord Lechmere bound himself by his covenant to lay out this sum of £30,000 in land, he, on the other, acquired a right to an estate for life and to a remainder in fee which by his death are now severed, and the remainder only descends upon the heir. If a man articles for a purchase, and binds himself, his heirs, executors and administrators, he may as well be called, in that case, both covenantor and covenantee, as in the present one; but yet the heir is entitled to have the purchase completed and may compel the executor to do it, because their rights are different as appears from *Holt* v. *Holt* (11). Wherever a man's design appears to turn his personal estate into land, this gives his heir an advantage which this court will never take from him. None of the cases cited warrants this present distinction that is endeavoured at, and in reason, I am sure, there is nothing to warrant it, the intent and agreement of the parties being the same in both cases, which, if effectual in one case, I cannot see why it should not be so in the other.

The only case from which anything like this distinction can be collected is that of *Lingen* v. *Sowray* (9), but I am no ways satisfied that that case was resolved upon that reason, for in that case, the husband had altered the trust, and the limitations of it. Besides, in that case nobody had any interest in it but he and his wife, and the court, as appears by the decree, laid great stress upon the change of his intent, appearing by changing the trust. Here, no change appearing, the intent remains as it was at the time of the covenant entered into, and consequently a very wide difference between the two cases. In *Chaplin* v. *Horner* (17) the husband alone was to have the benefit of the articles, and, therefore, it was not at all like the present case. I, therefore, think that this case falls within the common known rule that money articled to be laid out in land is to be looked upon as land. Lord Lechmere was bound at the time of his death to lay out this money in land, by which he gained a right to an estate for life with a remainder in fee, and, the estate for life being determined by the death, the right which he had to the remainder descends upon his heir. As it comes by his death, nothing that has been done by the Lady Lechmere, either as to the waiver of her jointure or anything else, can alter or defeat that right. Indeed, to suppose it would be absurd.

The cases upon satisfaction are generally between debtor and creditor, and the

heir is no creditor, but only stands in his ancestor's place. One rule of satisfaction is that it depends upon the intent of the party, and that whichever way the intent is that way it must be taken. But this is to be understood with some restrictions, as, that the thing intended for a satisfaction is of the same kind or a greater thing in satisfaction of a lesser, for if otherwise, this court will compel a man to be just before he is generous and so will decree both. [But see satisfaction and ademption pro tanto by a smaller second provision: 14 HALSBURY'S LAWS (3rd Edn.) 601.] But these questions are no way material in this case, which turns entirely upon Lord Lechmere's intent at the time of these purchases made. Those made before the covenant can never have been designed to go in performance of the subsequent covenant, his intent being clear that the whole sum of £30,000 should be laid out from the time of the covenant. Then there are terms, with covenants to purchase the fee, but terms are not descendible to the heir and so no satisfaction. The like of reversions especially seeing the lives did not fall in during Lord Lechmere's own life.

As to the purchases of lands in fee simple in possession, it is to be considered that there was no obligation upon Lord Lechmere to lay out the whole sum at one time. Here are lands in possession, lands of inheritance, purchased, which, although not purchased with the privity of trustees, yet it was natural for Lord Lechmere to suppose that the trustees would not dissent from those purchases, being entirely reasonable, the design of inserting trustees being not to prevent proper, but to prevent improper purchases, and although they were not purchased within the year, yet nobody suffered by it. So this circumstance cannot vary the intent of the party in a court of equity. The intent was that, as soon as the whole was laid out, it should be settled together, and not to make half a score of settlements. In *Wilcocks* v. *Wilcocks* (13) the covenant was not perfected. Nothing was done towards it strictly, but some steps were taken by the ancestor which seemed to be intended that way, and it is as reasonable to suppose these purchases to have been intended to satisfy this covenant in the present case as it was to suppose it so in that.

Decree varied as to this point only, namely, that freehold lands purchased in fee simple in possession after the covenant with part of the £30,000 and left to descend were ordered to go as satisfaction pro tanto.

DUCHY OF LANCASTER CASE

[ASSEMBLY OF JUDGES AND OTHERS TO ADVISE THE QUEEN: Michaelmas Term, 1561–2].]

[Reported 1 Plowd. 212; 75 E.R. 325]

Crown—Infancy of Sovereign—Capacity—Lease—Validity of lease granted by Sovereign while under 21—Position of Sovereign as Duke of Lancaster.

By common law no act which the Sovereign does as Sovereign is defeated by his being an infant at the time of the performance of the act. "For the King has in him two bodies, namely, a body natural and a body politic. His body natural is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age, and to the like defects that happen to the natural bodies of other people. But his body politic cannot be seen or handled, consisting of policy and government and constituted for the direction of the people and the management of the public weal, and this body is utterly void of infancy and old age and other defects and imbecilities which

the body natural is subject to, and for this cause what the King does in his body politic cannot be invalidated or frustrated by any disability of his natural body. Therefore, his letters patent, which give authority or jurisdiction or lands or tenements which he has as King shall not be avoided by reason of his nonage. . . . The King cannot take or part with anything save by matter of record."

Accordingly, a lease of lands granted by King Edward VI when he was under the age of 21 years was **held** to be valid and not avoided by reason of his nonage.

Observations as to the position of the Sovereign as Duke of Lancaster.

Notes. Referred to: *Sutton Hospital Case* (1612), ante p. 11; *Magdalen College, Cambridge, Vase* (1616), *post*; *Cheetham* v. *Crook* (1825), M'Cle. & Yo. 307; *Alcock* v. *Cooke*, [1824–34] All E.R.Rep. 497; *Meath* v. *Winchester* (1836), 3 Bing.N.C. 183; *Re Mason* (1928), 97 L.J.Ch. 321.

As to the natural and political capacities of the Sovereign, royal grants, and the Duchy of Lancaster, see 7 Halsbury's Laws (3rd Edn.) 215, 216; 312 et seq.; 544 et seq. For cases see 11 Digest (Repl.) 564, 640 et seq., 673, 674.

Case referred to:

(1) *Kniveton* v. *Shirley* (1425), cited 1 Plowd. at p. 216.

Report of Opinions of Judges and others learned in the law in a case depending in the court of the Duchy of Lancaster.

On the morrow of the term of St. Michael, viz., on the eve of St. Andrew the Apostle in 1561–2, Dyer, C.J. (Common Pleas); Saunders, C.B.; Rastall, J.; Anthony Browne, J., Corbet, J., Weston, J.; Freville, B., Carus, Queen's Serjeant, Serjeant Puttrell, Gerard, the Queen's Attorney, Ruswel, the Queen's Solicitor, Carell, Attorney of the Duchy, and Plowden, one of the counsel of the said court, by the Queen's command assembled at Serjeant's Inn, London, to confer together in order to understand the law in a case which was depending in the said court between the Queen, on the one part, and divers of her subjects severally on the other part, wherein the Queen required their resolution upon the matter in law.

A case was delivered to them in writing in this manner. King Henry VIII, being seised of certain lands in right of his Duchy of Lancaster, made a lease to W.C. by the advice of the counsel of the Duchy and under the Duchy Seal, for the term of 21 years, and died. After his death King Edward VI by like advice made a lease to R.W. of the same lands for the term of 21 years to commence immediately after the expiration, forfeiture, surrender, or other determination of the first term, King Edward VI then being within the age of 21 years. The question was whether Queen Elizabeth was bound by the lease made by King Edward VI or whether she should avoid it by reason of the nonage of King Edward VI.

It was agreed that by the common law no act which the King does as King shall be defeated by his nonage. For the King has in him two bodies, viz., a body natural, and a body politic. His body natural (if it be considered in itself) is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age, and to the like defects that happen to the natural bodies of other people. But his body politic is a body that cannot be seen or handled, consisting of policy and government and constituted for the direction of the people and the management of the public weal, and this body is utterly void of infancy and old age, and other natural defects and imbecilities, which the body natural is subject to, and for this cause what the King does in his body politic cannot be invalidated or frustrated by any disability in his natural body. Therefore, his letters-patent, which give authority or jurisdiction, or which give lands or tenements that he has as King shall not be avoided by reason of his nonage.

Hereupon was alleged what Thorp said in 26 Lib. Ass., pl. 54, that

"the King's gift shall not be defeated by his nonage, and so have many peers and sages of the realm said."

Also it was said, it appears in Y.B. 6 Edw. 3, fo. 50, pl. 49, that the same King Edward III brought a writ of right of a manor, as heir to King Richard, and there it was pleaded that the King was within age, judgment if during his nonage he should be received to this writ, and the exception was not allowed for which reason the tenant demanded the view and had it. By which cases it appears that the nonage which the King has in his natural body shall not blemish or defeat the acts or suits which he does or pursues in his body politic.

Further, as to the things which he has in his body natural, they took the law to be that, if the King has land by descent on the part of his mother or other ancestor, or which he (when King) purchased in fee in the capacity of his body natural, or which he purchased before he was King if he (being King) gives them to another during his nonage such gift, by the course of the common law, shall never be defeated by reason of his nonage. For although he has or takes the land in his natural body, yet to this natural body is conjoined his body politic, which contains his royal estate and dignity, and the body politic includes the body natural, but the body natural is the lesser, and with this the body politic is consolidated. So that he has a body natural, adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person, and make one body and not divers, that is the body corporate in the body natural, et e contra the body natural in the body corporate. So that the body natural, by the conjunction of the body politic to it (which body politic contains the office, government and Majesty royal), is magnified, and by the said consolidation has in it the body politic, for which reason the acts which the King does touching the things that he possesses or inherits in the body natural, require the same circumstance and order as the things which he possesses or inherits in the body politic do, for the thing possessed is not of such consideration as to change the nature of the King's person, but the person who possesses it changes the course of the thing possessed. Therefore, it was held that, if the King will part with land in fee which he has by descent on the part of his mother, or by some other ancestor who was not King, this shall pass by his letters patent only without other matter, and without livery of seisin, for he cannot make livery of seisin in his body natural, distinct from the body politic, because they are the one same body and not divers. So that he cannot do it without doing it as King, and it would be inconvenient and beneath the dignity royal for the law to make the King give livery in proper person to a subject. Besides livery of seisin is matter of fact, which the King cannot do, for his acts ought to pass by matter of record, which is suitable to His Majesty. Therefore, the land shall pass by the King's letters patent only by the course of the common law.

So it has been the practice with regard to the lands which descended to the King from the Duke of York, the Earl of March, and others of the King's ancestors, who never were kings. Also if a man would give land to the King and to his heirs, which he would vest in his body natural and not in his body politic, the King cannot take this by livery, but it ought to pass to him by deed enrolled or matter of record, causa qua supra. If the mother or other ancestor of the King makes a lease for life, rendering rent, with re-entry for default of payment and dies, so that the reversion descends to the King, if the rent be in arrear, he shall re-enter without demand, for he is not bound by law to make demand in his proper person, causa qua supra. But the breach of a condition ought to be found by office before the entry of the King. So, if the King alienates land which he had by descent from his mother, he shall not defeat it by reason that he was within age at the time of the alienation, for his body politic, which is annexed to his body natural, takes away the imbecility of his body natural, and draws the body natural, which is the lesser and all the effects thereof to itself, which is the greater, quia magis dignum trahit ad se minus dignum. Yet, if land descends to the King from his common ancestor, he shall have it by reason of his body natural, for this body is

privy to the descent, but the body politic is not privy to this descent. If the second son of the King purchases land and alienates it within age, and afterwards the King and his eldest son die so that the second son becomes King, he may enter for the nonage which was in him before, viz., at the time of the alienation when he was not King, but yet he ought to have an office before his entry to find his title, because his person, which had a right of entry before, has now the estate royal united to it which can do nothing without record. But if he had been King at the time of the alienation he should never have avoided it by reason of his nonage, for it would be repugnant to say that he is disabled to make a feoffment or lease, who is admitted and received to govern the realm and the people, and all the business of the realm.

In the principal case here King Henry IV was son and heir to John a Gaunt, who was one of the sons of King Edward III and also son and heir to Blanch, wife of John a Gaunt, who was daughter and heir to Henry Duke of Lancaster. So that the Duchy of Lancaster came to King Henry IV by descent on the part of his mother, and, if he had not afterwards been King, his possessions should have passed by livery and seisin and attornment, etc., in the same manner as the possessions of other subjects ought to pass. But after he had deposed King Richard II and had assumed upon him the royal estate, and so had conjoined to his natural body the body politic of King of this realm, and was become King, then the possessions of the Duchy of Lancaster were in him as King, and not as duke, for the name of duke being lower than the name of King, was drowned by the name of King, and by the accession of the estate royal to him who was duke, for the King could not be duke in his own realm, although he might out of it. In like manner the name of the Duchy and all the franchises, liberties, and jurisdictions thereof, while they were in the hands of him that had the Crown and jurisdiction royal, were extinguished by the common law. After that the possession of the Duchy of Lancaster could not pass from King Henry IV by livery of seisin, but by his letters patent under the Great Seal of England without any livery of seisin or attornment as the possessions of the dukedom of York, or the earldom of March, or such other possessions which have descended to the Kings of this realm from other ancestors than Kings have used to pass heretofore from the Kings of this realm, and so they should have passed until this day by the common law if no statute had been made to the contrary. Therefore, his grant or alienation of the lands, parcel of the duchy made during his nonage, should not be avoided by the common law.

So, they took the common law to be in this case. But in order to take away the common law, and to have the Duchy to be a Duchy with liberties to it, as it was before, and to alter the order and degree of the lands of the Duchy, King Henry IV made a charter by authority of Parliament, which is entitled Carta Regis Henrici quarti de separatione Ducatus Lancastriæ a Corona Auctoritate Parliamenti, anno Regni sui primo. By which charter it is ordained that the Duchy of Lancaster and all the possessions thereof shall not be altered or changed by reason that King Henry IV assumed the royal estate upon him, but that they shall be preserved and continued in the same form, condition, and estate in which they descended and came to him, and shall remain to the same heirs contained in the charters beforementioned, and that they should so, in such manner, and by such officers and ministers in all points remain, be ordered, governed and demeaned, as they should have been if he had never been King. So that by these words the Duchy is a Duchy with the like franchises and liberties as it was before, merely disjoined from the Crown and from the Ministers and officers of the Crown, and from the receipt of the revenues of the Crown, and from such order of conveyance as the law requires in the passing of the possessions of the Crown, for, if the King would give any lands parcel of the duchy to another in fee or for life he ought to make livery of seisin, and also upon his grants of the reversion there ought to be attornment, in the same manner as there should have been before he was king. And this is by reason of these words of the charter: quod taliter et tali modo

remaneat, deducantur, gubernantur, et pertractentur, sicut remanere, deduci, gubernari, et pertractari deberent, si ad culmen dignitatis regiæ assumpti minime fuissemus, and also by reason of the other words in the said charter. A

This separation, division, and severance of the Duchy from the Crown, and from the receipt and order of the possessions of the Crown, seemed to the judges and other the counsellors above mentioned to be a politic scheme of King Henry IV who well knew that he had the Duchy of Lancaster upon a good and indefeasible title B and that his title to the Crown was not so good, and, therefore, having some distrust that in time to come the Crown might be taken from him or his heirs, and being desirous nevertheless that the Duchy should continue to him and his heirs, and knowing at the same time that if the possessions of the Duchy should be mixed with the possessions of the Crown and not be notoriously cut and dissevered from the possessions of the Crown, it might be a means of causing the Duchy the sooner C to be taken away from him or his heirs, or at least he or his heirs would receive no good by their being mixed with the possessions of the Crown if the Crown should be taken from him or his heirs, for these reasons he made the said charter by the authority of Parliament whereby the separation is made as is shown before. But notwithstanding that the possessions of the Duchy ought to be demeaned and ordered, and pass as they should before Henry IV was king by force of the D words of the charter, yet there is no clause in the charter which makes the person of the King that has the Duchy to be in any other degree than it was before; for things which concern his person he shall be in the same estate as he was before. So that, if the law before the charter adjudged the person of the King to be of full age, having regard to his gifts as well of the land which he inherits in his body natural as of that which he inherits in right of his Crown, so he shall be adjudged E with regard to the lands of the Duchy ever since the charter, for the charter extends only to the estate, condition, and order of the lands of the Duchy, but does not reach to the person of the King who has the lands in points touching his person, nor does it diminish or alter the pre-eminences which the law gives or attributes to the person of the King, but the same continue as well with regard to the possessions of the Duchy of Lancaster, as the lands which come to him from other ancestors. F

Wherefore, notwithstanding the order limited by the charter for the lands of the Duchy, viz.:

> "quod taliter et tali modo remaneant, deducantur, gubernentur, et pertractentur, sicut remanere, deduci, gubernari, et pertractari deberent, si ad culmen dignitatis regiæ assumpti minime fuissemus"

G

and notwithstanding that these words have been so taken as to make the Duchy lands of the King pass by other order and circumstance than other lands which he inherits in his body natural, yet these cases [i.e., Y.B. 10 Hen. 4, fo. 7, pl. 5, and *Kniveton* v. *Shirley* (1)] prove that the person of the King with regard to the Duchy lands shall be used, demeaned, have his prerogatives, and be in like estate, as he should have had or been if the charter aforesaid had not been made although H the estate and nature of the land is in another degree. The prerogative which the common law gives to the person of the King to be always of full age, and never within age, is as firmly annexed to him with regard to the Duchy lands, as the prerogative of non omittas, or of not proceeding to issue without aid of him in the case before recited, and nonage is a thing which touches the person more than the land, but the land of the Duchy and the things which concern it more than the I person shall be demeaned and used as if a common person had held them. So is the diversity between the estate and degree of the land of the Duchy, and the estate and degree of the person who inherits the land of the Duchy. And although the charter and the Act [of 3 Hen. 5, concerning the Duchy seal] make the King to have the Duchy and all the liberties, privileges, and jurisdictions thereof as they were before in the hands of the duke, yet they do not make the King to be Duke of Lancaster, for there is not a word in them to any such purpose, nor can it be reasonably supposed to be the intent of the charter or of the makers of the Act

to make him so, for the King cannot be duke in his own realm, though he may out of it, for his name and dignity of King merges and drowns the inferior name and dignity of the Duke within his own realm. And after the charter, if a lease had been made of parcel of the Duchy by the name of Henry Duke of Lancaster, without other name, it had been void, for it should have been in the name of Henry IV, King of England. For this reason it is that in leases which the Kings have made of the possessions of the Duchy they have used to call themselves Kings and not dukes, and in offices it is usual to find that the tenant held of the King as of the Duchy of Lancaster, and it is not well found that he held of the King as Duke of Lancaster for he is not duke but King. So that the condition of his person and his prerogatives are not to be comprehended or measured by the estate or name of Duke, but according to the estate and name of King. And infancy, which is a great disability, is repugnant to the estate of a King, and although the natural body of the King is subject to infancy, yet when the body politic is conjoined with it, and one body is made of them both, the whole body shall have all the properties, qualities and degrees of the body politic which is the greater and more worthy, and in which there is not nor can be any infancy. So, neither the common law nor the charter (although it be by authority of Parliament) gives authority to the King or his heirs to avoid by reason of nonage such leases as he makes during his nonage.

Wherefore it seemed to them that the whole intent of King Henry IV and of the charter and Act was only to sever the lands, possessions, privileges, jurisdictions and hereditaments of the Duchy from the hereditaments of the Crown, viz., in survey, order, government and process, but not in person, so long as by the grace of God the Crown and the Duchy should continue and abide together in the blood of the Duke of Lancaster, and of the said Blanch, mother of Henry IV, and that, if the Crown should afterwards by any means be taken out of the blood of the Duke of Lancaster, that yet the Duchy should continue in the blood of the Duke. So the intent of the charter may be satisfied without derogating from the person of the King or destroying the dignity or pre-eminence which the law attributes to it.

[Their Lordships considered the statute of 3 Hen. 5 (1415) concerning the Duchy seal and the statute of 1 Edw. 4 (1461) which provided for the "confiscation for ever of the Duchy of Lancaster to the Crown], and the report continues] : From which Acts the said justices and counsellors inferred that if, before their making the nonage of the King had been any cause to avoid gifts or leases made by him within age of the lands of the Duchy, yet it was made clear by the later statute that his nonage was now no cause to avoid them, for by that Act the Duchy was annexed to the Crown. It is to be observed, the report continues, that King Edward took himself to be lawful inheritor of the Crown of England and that the House of Lancaster had unlawfully usurped upon him and his ancestors. As the House of Lancaster, doubting their title to the Crown, intended to preserve their inheritance of the Duchy of Lancaster, in which they had no manner of doubt while it was disjoined from the Crown, so on the contrary King Edward IV, knowing his title to the Crown to be undoubted, intended to extirpate the House of Lancaster, and to unite to the Crown their inheritance in which he had no title but in right of Crown, viz., for treason committed against it, and to vest the Duchy, and all the possessions thereof, in the body politic of the King. To this purpose are the words of the later Act, viz., that King Edward IV shall have, seize, take, hold, enjoy and inherit all the said manors, etc., from the fourth day of March, to him and to his heirs Kings of England perpetually. So that the said inheritance of the Duchy is placed and settled only in the body politic of the King in which person there is no nonage or other imbecility to which the body natural is subject. By these words, as well as by the other words in the Act, by which it is ordained that King Henry VI shall forfeit to King Edward IV and to his heirs, and to the Crown of England, the hereditaments of the Duchy, the County Palatine of Lancaster, and the court of the Duchy, and the liberties and franchises thereof should

have been utterly dissolved and extinguished in the Crown, if there had been no other provision made in the Act, for the Crown, which receives any hereditaments by escheat (as it did these here) merges all jurisdictions, franchises and liberties had and used in them, which were before derived from the Crown, for the greater extinguishes the lesser. So that the Act, having relation to the fourth day of March last past (on which day King Edward IV began his reign) would have extinguished the said County Palatine and the said court and the liberties thereof, from the said fourth day of March thenceforwards for ever, if it had stopped there without making any other provision, but to raise it up again, it was necessary to have a new erection or a saving by words proper for it. Therefore King Edward IV, being desirous that the Duchy and all that belonged to it should be as it was before as to the order and direction of it, he made a new establishment thereupon by the Act, whereby it is ordained and established that the same manors, castles, etc., should make, and from the third day of March be the said Duchy of Lancaster incorporate, and be called the Duchy of Lancaster, and that the county of Lancaster should be a County Palatine, and that the King should have, as parcel of the Duchy, the same County Palatine, and a seal, chancellor, judges and officers there, and the liberties and other things as in the said Act is before recited. So that this last Act has established or confirmed the County Palatine from the third day of March last before the Act, and that King Edward should have the hereditaments thereof, by the name of the Duchy, from the fourth day of March, to him and to his heirs Kings of England for ever.

Yet it shows how he shall have them, viz., from all other his inheritances separate. How separate? Not from the person of the King, as King, but from the order of the other possessions of the King as to pass by another seal than a lease of the possessions of the Crown is used to do, and by other means than possessions of the Crown shall pass by, viz., by livery of seisin and by attornment, and by other officers than the officers of the possessions of the Crown, and by such other rules and methods used before. To prove that the Duchy is separated from the other possessions of the Crown in the method of conveyance, since this Act as it was before the Act, in the case in Y.B. 21 Edw. 4, fo. 60, pl. 17, in the Exchequer Chamber, it was held by all the justices, that if the King makes a feoffment of the lands which he has in right of his Duchy of Lancaster in fee, or for term of life, it is necessary to have livery of seisin as well as if the feoffment be made by a common person, unless it be of lands within the County Palatine, which shall pass by the letters patent of the Duchy without livery. So that the word "separate" may and ought to be taken separate in respect of order, but not separate from the person of the King as King. Wherefore the said statute of King Edward IV ordains three things: first, it establishes the County Palatine of Lancaster; secondly, it vests it in the body politic of the King of this realm and his heirs; thirdly, it divides it from the order of the other possessions of the Crown. In this form the Duchy continued until the time of King Henry VII.

Reference was made to the statute of 1 Hen. 7, entitled a repeal of a feoffment made by King Edward IV of certain lands and tenements of the Duchy of Lancaster, by authority of Parliament, for the performance of his last will, in the twelfth year of his reign, which provided:

> "The King our Sovereign Lord shall have, hold, enjoy, and possess, from [Aug. 21, 1485] to him and to his heirs for ever . . . all the honours, castles, lordships, manors, lands, tenements, rents, reversions, services, possessions and hereditaments, with their appurtenances, that were parcel of the said Duchy of Lancaster, in the hands or possession of the said Edward late King of England, the fourth day of March [1461] or any time after, or in the hands or possession of Richard III, late in deed and not in right King of England, any time during his reign, with all liberties, freedom, franchises, and other things, as well to the County Palatine, as to any other the premises appertaining or belonging; and to be governed by like officers, and use like seals, as for

time past have been used and accustomed, in as ample and large manner, and in like manner, form and condition, separate from the Crown of England, and the possessions of the same, as Henry IV, Henry V, Henry VI the King's noble progenitors, late Kings of this realm, or the said Edward late King had and held, or any of the said Kings had and held, any Act or statute before this made in anywise notwithstanding."

After discussion it was agreed that the Duchy remained not separated in inheritance and in right from the Crown, and that it was not divested out of the body politic of the King, in which capacity only it was, and vested in the body natural of King Henry VII. Therefore, all the justices, serjeants, and counsellors, assembled on the eve of St. Andrew, except RUSWEL, agreed that the leases made of the lands, parcel of the Duchy (whether the lands lay out of the County Palatine of Lancaster, or within it), were not voidable for the nonage of the King Edward VI; and that the law was all one where the lease was made of lands of the Duchy which were not in lease to commence presently and where to commence after the end of another lease before made, and that neither the one nor the other was voidable for the nonage of King Edward VI. The next day, being the feast of St. Andrew the Apostle, the justices went to CATLIN, C.J., who was sick at his house, to have his opinion on the case, and he agreed in opinion with them that the leases of King Edward VI were not voidable by reason of his nonage. On Monday, the morrow of St. Andrew the Apostle, all the justices, serjeants and counsellors, at a time appointed for the same, went to York Place to report their resolution to SIR NICHOLAS BACON, Keeper of the Great Seal, and to SIR AMBROSE CAVE, Chancellor of the Duchy, to the intent that SIR NICHOLAS BACON might report it to the Queen according as Her Majesty had given orders.

GREEN *v.* RUTHERFORTH AND OTHERS

[COURT OF CHANCERY (Lord Hardwicke, L.C., and Sir John Strange, M.R.), May 23, 1750]

[Reported 1 Ves. Sen. 462; 27 E.R. 1144]

Charity—Visitor—Origin of power—Functions—Charity vested in trustees—Authority of court.

The origin of visitatorial power is the property of the donor and the power everyone has to dispose, direct, and regulate his own property. If either the Crown or the subject creates an eleemosynary foundation and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder, or his heirs, or the person specially appointed by him, to be visitor to determine concerning his own creature. If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication.

Trustee—Corporate body—Collegiate body—Devise of advowson to college—Trust as to appointment to rectory—Enforcement by court.

A collegiate body whose founder has given a visitor to superintend his foundation and bounty can act as trustees to carry out the wishes of the founder expressed in his will as to the persons to be presented to a rectory, the advowson respecting which he had devised to the master, fellows, and scholars of the college, and the court will compel the collegiate body to execute the trust as if it were a private person, the visitor having no right to interpose in the execution of the trusts of the will.

Court—Jurisdiction—Limited jurisdiction—Extension—Consent of parties. A
The jurisdiction of a court of limited jurisdiction cannot be extended beyond its limits by the consent of the parties.

Notes. Referred to: *St. John's College, Cambridge* v. *Todington* (1757), 1 Burr. 158; *R.* v. *Windham*, [1775–1802] All E.R.Rep. 362; *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435.

As to the jurisdiction of a visitor, see 4 HALSBURY'S LAWS (3rd Edn.) 408–414. B For cases see 8 DIGEST (Repl.) 504–508.

Cases referred to:

(1) *R.* v. *Bishop of Chester* (1728), 1 Barn.K.B. 52; 2 Stra. 797; 94 E.R. 36; 8 Digest (Repl.) 510, *2360.*

(2) *Philips* v. *Bury* (1694), ante p. 53; Carth. 180, 319; Comb. 265, 314; Holt, K.B. 715; 4 Mod. Rep. 106; 1 Ld. Raym. 5; 1 Show. 360; Show. Parl. Cas. 35; Skin. 447; 2 Term. Rep. 346; 90 E.R. 198, H.L.; 8 Digest (Repl.) 507, *2297.* C

(3) *Dean and Chapter of Christ Church and Parotts Case* (1584), 4 Leon. 190; 74 E.R. 813; 13 Digest (Repl.) 192, *117.*

(4) *Cambridge University* v. *Crofts* (1714), unreported.

(5) *R. v. Bland* (1740), 7 Mod. Rep. 355; 87 E.R. 1287; 19 Digest (Repl.) 659, *347.* D

(6) *R.* v. *St. John's College, Cambridge* (1693), 4 Mod. Rep. 233; Skin. 393; Comb. 279; Holt, K.B. 436; 87 E.R. 366; 19 Digest (Repl.) 656, *327.*

(7) *A.-G.* v. *Talbot* (1748), 1 Ves. Sen. 78; 3 Atk. 662; 27 E.R. 903, L.C.; 8 Digest (Repl.) 507, *2308.*

(8) *Jennings of Clare Hall Case* (1698), 5 Mod. Rep. 422. E

(9) *R.* v. *All Souls College, Oxford* (1681), T.Jo. 174; Skin. 12; 84 E.R. 1203; sub nom. *R.* v. *Alsop*, 2 Show. 170; 8 Digest (Repl.) 505, *2274.*

Also referred to in argument:

Eden v. *Foster* (1726), 2 P.Wms. 325; Cas. temp. King, 36; 24 E.R. 750; sub nom. *Birmingham School Case*, Gilb. Ch. 178, L.C.; 8 Digest (Repl.) 507, *2305.* F

Bill against the master, fellows, and scholars of St. John's College, Cambridge, to oblige Dr. Rutherforth to deliver up a presentation made by the college of him to the rectory and parish church of Barrow, in Suffolk, to restrain his having institution and induction thereon, and to present the plaintiff under their common seal. G

The bill stated that Margaret Countess of Richmond, mother of King Henry VII, founded this college; that Queen Elizabeth in her twenty-second year gave a new body of statutes to the college, which were accepted by them, and under which they had since been governed; that by uninterrupted usage of the college whenever a benefice became vacant, the senior fellow on the divinity line was presented, whether he had taken the degree or not; that Dr. John Bowton, a fellow, by will H in 1689 devised to the master, fellows and scholars of the college and their successors, the perpetual advowson of this rectory on trust, that whenever the church should be void and his nephew should be capable to be presented thereto they should present him, and on the next avoidance should present one of his name and kindred if there should be any such capable thereof in the college and if no such, they should present the senior divine then fellow of the college, on his I refusal the next senior divine, and so downward, and if all refused, they should present any other person they should think fit, but that whatever fellow accepted it should be obliged to resign his fellowship and place in the college within one year.

The last incumbent dying in May, 1749, it was offered to the senior fellow, and on his refusal to the next until it came to the plaintiff's turn as next senior on the divinity line. He offered to take it, and they were desired to present him, but the defendant insisted that he, being doctor in divinity, was to be considered as the

A person described by the testator and appealed to the Bishop of Ely as visitor. The bishop was of opinion that Dr. Rutherforth was within the description of the will, and, therefore, required them to present him. To avoid being censured, they made a special presentation under their common seal, but the plaintiff insisted that as the advowson was devised to the college under particular trust by a third person not the founder, the visitor had no jurisdiction to determine of the presentation or to interpose in execution of the trust. Therefore, the plaintiff prayed that presentation might be cancelled, and that the college might be directed to present him as entitled under the trust of the will.

Dr. Rutherforth put in a plea to the jurisdiction of the Court of Chancery in which he stated and set forth verbatim the will and statutes, the first of which was de ambiguis et obscuris interpretandis wherein Queen Elizabeth reserved a power of adding, diminishing, changing, disposing and inhibiting all others therefrom. If the Bishop of Ely or any other should make new statutes, she absolved the college from obeying them, and if any doubt should arise on her statutes, they should send to the Bishop of Ely, and submit to his decision on pain of removal. The next statute set out was de visitatore. The next was de collatione beneficiorum that on a vacancy of any benefice they should within a month after confer the same socio secudum gradum suum maxime seniori qui nullum ecclesiasticum beneficium habet. After which the defendant says further that he had heard and believed that the Bishop of Ely for the time being and no other had been of right visitor, and exercised all powers and jurisdiction over the master, fellows and scholars of the college, and all other matters within the jurisdiction of a visitor, in as ample a manner as might be lawfully exercised, and that he and no other court had determined controversies about the construction of the statutes and right of presentation, whether given by the original foundress or subsequent benefactor. He then set forth the will of Dr. Bowton, who had been long a fellow and well acquainted with the statutes. He then stated the facts of his presentation on his appeal, to which the master, fellows and scholars had put in an answer, and averred that the plaintiff never appealed to the visitor to hear his right or claim, that the bishop had the right to compel all the members to answer upon oath as to all matters touching presentation of a living, and to enforce the prosecution of all the statutes. He asked whether he ought to be compelled to answer the plaintiff's bill, and whether this court ought to proceed further in the said suit.

After argument the court reserved judgment which was later delivered as follows:

SIR JOHN STRANGE, M.R.—On the case, as it stands on the pleadings, must the opinion of the court be grounded, for nothing on either side, not contained in the pleadings, can be taken notice of. In the argument many things have been gone into as to visitatorial power in general, and the particular constitution of the visitor of this college, of which there is no occasion to deliver an opinion. I shall confine myself to the merits of the plea on the general question whether to allow it or not, and on the best consideration I am of opinion to overrule this plea.

First, to remove an argument much relied on for the defendant on the head of inconvenience—that, if this living does not fall within the conusance of the visitor, all livings given or purchased subsequent to the first foundation of the college by a private person, and even a bequest of books, etc., will be exempted from the visitor's power. In answer to which, this is not a purchase or general bequest of an advowson to the college without any particular trust annexed, for then, though it came after appointment of the visitor, and from a third person (not the founder) or by purchase, it would fall under the general regulations controlling all the other property of that nature and be equally the object of visitatorial power, if the former were so, but this is circumscribed by particular, express trust, inconsistent with the regulations, by which the other property is to be governed, and, therefore, proper for the jurisdiction of this court, standing on special circumstances peculiar to itself, the decision of which cannot have such extensive consequences as is objected.

The merits of the controversy depend on the construction of the will, and execution of the particular trusts therein contained, both which are undeniably proper for the jurisdiction of this court. Although the will was made so long ago, yet it is necessary to take up the case as it stands on the whole frame of the will and from the death of testator. It is not a general bequest of the living like any other patron seised of an advowson, but to particular intents and purposes specified by the will. The defendant's counsel were forced to admit the words were sufficient to create a trust for the benefit of those particularly provided for. At making the will the living was full, and, therefore, testator could only direct what he would have done on the first vacancy. If on a vacancy the nephew, being capable, had offered to take it, and the college refused to present him, on his resorting to a court of equity for an execution of that trust, which was in them, the court would not have sent him away without that remedy, which is the ordinary and natural justice. A private person would undoubtedly be compellable to execute it, and, considered as a trust, it makes no difference who are the trustees, the power of this court operating on them in the capacity of trustees, and although they are a collegiate body whose founder has given a visitor to superintend his own foundation and bounty, yet, as between one claiming under a separate benefactor and these trustees for special purposes, the court will look on them as trustees only, and oblige them to execute it under direction of the court. They were compellable also in the same manner to execute the next trust in the will to one of testator's name and kin.

The defendant's counsel were so aware that this would be the consequence so far that they endeavoured to separate the cases of the nephew and kin from the other provisions in the will by saying that the two former were now at an end, and that it does not follow, because the court might interpose in those cases if applied to, they would have jurisdiction in the present case, which comes under the next provision and is as express and special a trust as either of the others, with this only difference, that those trusts were at an end, whereas this was permanent, to be executed on every vacancy, and calls as loudly for direction of the court as either of the others.

If a bill had been brought recently against the heir-at-law, it must have been for two purposes: first, to have the will declared, well proved and established against the heir and all claiming under him; next to have the direction of the court for carrying the trusts of the will into execution. The court would have taken into consideration what were the trusts and the directions proper on them, and had this trust for the senior divine come under consideration the court would have declared their sense of the words and who came within that description. If the college afterwards executed another trust, contradicting the judgment of the court in that instance by presenting a fellow they thought came under that description, the court would not have endured such an opposition, but would have relieved the injured party. So if the college were disposed to have pursued the opinion of the court, but were intimidated by the visitor, who put a different construction on the will, the court would have carried its own decree into execution. If this would be so on a recent application, there is no alteration in the nature and reason of the case that the directions on this part of the trusts are not prayed until wanted in this particular instance.

There are many cases of plain trusts, of which there is no doubt, and which the trustees execute without applying to the court, but when there comes a more remote trust of a doubtful nature and it is necessary to pray for the direction of the court, it would be equally proper to apply then as on the first. This is the present case, wherein either the college, who are trustees, or the person thinking himself senior divine, for whom they are entrusted, may come into this court for directions, which is the purport of the present bill. This is grounded on the special trusts in the will, allowing the bishop to be appointed general visitor by the founder, for notwithstanding that, this being given on special trust, the visitor

has no jurisdiction to determine who shall be presented to this rectory, or to interpose in the execution of the trusts of this will.

This would be my opinion, were there no inconsistency between the statutes of the college and the will: but when the nature of those statutes are considered, and so far as relates to the college livings, are compared to the trusts of the will, it will appear, that to judge by the statutes, which is the visitor's rule, will be contrary to the intent of testator, and defeating the will. The members are sworn to obey the statutes on pain of removal, but if an advowson is accepted by them on other terms, that must be considered as not within the compass of the oath to the founder, or else it must be said that one cannot be the regulator of his own gift, if there is a visitor. In all the instances the visitor, whose judgment must be founded on the statutes, cannot execute the trusts of this will, for that would be departing from the statutes, and the adhering to the statutes would be adding further circumstances to the trust than the testator prescribed and making it the founder's will, not his. I agree that a subsequent benefaction may be put under the same power as the founder's, and the visitor will have an equal authority over them, for, being a co-founder in that respect, he will be so far considered as appointer of the visitor.

In this case the testator is donor; has given rules in his will which are his statutes; has not made the bishop visitor; nor excluded this court from its jurisdiction by putting it elsewhere. The right of the visitor is said to be submitted to by the answer to the appeal, but that admission cannot give a jurisdiction the visitor has not, or take away the ordinary jurisdiction of the court, or bind the parties themselves: 2 Roll. Abr. 312, pl. 14, where it was held that the party may pray a prohibition against his own suit. The objection that this suit is between two, both subject to the visitor's power, proves too much, for none will contend that in matters out of the jurisdiction of the college between two fellows the visitor is to judge. Nor is it an argument that because an action for damages will lie against the visitor for exceeding his jurisdiction, therefore, this court will not interpose. It might be more for the party's benefit to have a specific execution of the trust and the living for life than the action against the visitor. So it might be said, where the party proceeds out of his jurisdiction, an action will lie against him, yet in such a case a prohibition will go notwithstanding. I do not see that the visitor has any such power of compelling the presentee to resign at the end of the year as the will requires. He may, indeed, proceed to removal in many instances on the statutes, but then it must be for offences contrary to the statutes, having no jurisdiction as to breaches of the will, but this court can do it in the same manner as it enforces performance of its other decrees, the non-performance of which will be a contempt and punished as such by the ordinary process of this court. An obstinate man may in all cases prevent a specific performance, but he does it at the expense of his liberty, nor was that ever an objection to the propriety of making the decree. This is a question of mere matter of property: Who ought to have this living under the special trusts of the will? I cannot say (and yet if the plea is allowed I must say) that the plaintiff is not entitled to the opinion of the court on the trust in question of this nature, or may go higher on any mistake, and not be finally concluded by any single opinion.

LORD HARDWICKE, L.C.—As I entirely concur with the Master of the Rolls in the main question, so likewise in his manner of treating it. The case is fully stated, and the only question now to be determined is whether the plea is sufficient in law and equity to oust this court of all manner of jurisdiction of the cause.

Under the general question two points are made. First, whether it is sufficiently shown by the plea that the bishop is general visitor of this college. Secondly, supposing that to be shown and that it ought to be so taken on this plea whether the presentation to the living under the will, set forth and admitted by the plea, is within and a proper subject of the visitatorial power. A third point was attempted for the defendant—that the answer by the master, fellows and scholars, particularly

by the plaintiff, before the visitor, and by several acts, there has been a submission to the jurisdiction of the visitor which is conclusive. There is no colour for it, for in case of a private, particular, limited jurisdiction, and of courts proceeding by rules different from the general law of the land, no appearance, answering or pleading of the party, will give a jurisdiction to the court. If there is a want of jurisdiction in the cause, it may be called in question at any time, even after sentence, which is the case of all prohibitions, granted every term by the common law courts for a nullity of jurisdiction, so that it may be applied for even against the party's own suit, and the same holds in a collateral action or suit.

As to the first point, I agree that it is not necessary, and, therefore, not proper, to enter into a strict determination whether or not all the statutes are set forth in the plea. It is not possible for the court to take notice of it, but on so much as is set forth, I think it appears that the bishop is general visitor, but he is by the statutes prohibited to give new statutes, or put in execution those of any other. If he does, the college are absolved from obedience, Queen Elizabeth reserving the power of adding, etc., hence arises the difficulty as a case may happen in which the master, fellows and scholars may be subject to be removed by another power different from the bishop's, and that even for obeying the bishop's sentence. How then can the bishop be said to be general visitor? But I am satisfied on that head that the bishop for the time being is general visitor until such a case happens. The grounds on which the Court of King's Bench went in the case of Manchester College (*R.* v. *Bishop of Chester* (1)) govern that question. A mandamus was issued to the bishop to admit a fellow of that college. The bishop returned that it was a royal foundation and that he was general visitor, and set forth the constitution. On exception to the return the court ordered a peremptory mandamus on the ground that it was clear the bishop's visitatorial power was then suspended, for he was warden of the college and could not visit himself, that powers of this kind might cease and revive without inconvenience, and that at that time the jurisdiction was in the King's courts because no visitatorial power was in force. By like reason, as that court held, a general visitatorial power might cease and revive, and during the cesser the jurisdiction would for want of particular appointment or reservation of power devolve on the King's court of general jurisdiction. So in the present case where the power of legislation is reserved to the Crown. Therefore, I am satisfied on the doubt I had.

This leads to the second and main point, on the merits of the plea. I agree that the presentation set forth by the plea is not a proper subject of visitatorial power. To argue this clearly the original and nature of visitatorial power must be considered. The original of all such power is the property of the donor, and the power everyone has to dispose, direct, and regulate his own property, like the case of patronage, cujus est dare, etc. Therefore, if either the Crown or the subject creates an eleemosynary foundation and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder, or his heirs, or the person specially appointed by him, to be visitor to determine concerning his own creature. If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power, from which account it appears that the nature of this power is forum domesticum, the private jurisdiction of the founder, and cannot extend further unless some other person grafts upon it, and by express words or necessary implication subjects the estate or emolument given by him to the same visitatorial power, and to be governed by the same rules. Then the former visitor is a visitor created by that subsequent founder or donor, the grounds of which appear from Sir John Holt, C.J., in *Philips* v. *Bury* (2). The topics of Bishop Stillingfleet are drawn from foreign laws, to be governed by the ecclesiastical law, which the law of England totally disclaims and rejects. The founder may give a general power, or may limit and bind by particular statutes and laws; may give the visitor power of altering or giving new statutes or may restrain from doing it, or from acting

A according to any other, as is done in the present case. If the power to the visitor is unlimited and universal, he has in respect of the foundation and property moving from the founder no rule but his sound discretion. If there are particular statutes, they are his rule, he is bound by them; and if he acts contrary to or exceeds them or acts without jurisdiction, the question being still open whether he has acted within his jurisdiction or not, if not, his act is a nullity: Sir John Holt, C.J., B in *Philips* v. *Bury* (2), where the Bishop of Exeter was undoubtedly visitor generally.

To apply this general reasoning I will lay down some propositions which I will afterwards illustrate. First, this rectory was no part of the property of the founder, but given by a subsequent donor on special trust. Secondly, this trust is limited by rules different from, and in some parts contrary to the statutes of the foundress. C Thirdly, the visitor has authority to judge only according to the statutes of the foundress, and is restrained from acting otherwise; consequently, he has no power to execute this trust. Fourthly, the bishop cannot give remedy in many cases, which may arise on this trust. Fifthly, as a consequence from the whole here is a nullity of jurisdiction in the visitor; and relief must belong to the King's general courts of jurisdiction.

D As to the first, the fact is plain and admitted to be a trust. I agree in general that if a subsequent donor gives the legal estate, or in trust, for the college without a declaration of a special trust it will fall under the power of the general visitor to judge of the legal property in the one case, or the equitable in the other, because by giving in trust for the college generally, and neither creating a distinct visitor nor a special trust, the donor has by plain implication intended that it should fall E under the general statutes and rules of the college and be regulated with the rest of their property, although in the latter case, indeed, a bill must be in equity to compel the trustees, if they refused, but in the present case the testator has declared a particular, special trust which must in some way be carried into execution and the will observed.

The second appears sufficiently in many instances on comparing the trusts of the F will with the statutes.

The third also appears plainly from the statutes. But it is said, the will may be considered as a new statute as to this. If so, the visitor is absolutely restrained from executing this trust, and the master, fellows and scholars prohibited from obeying, from which would follow absurdities. The objection is founded on the principle that this is a living within the description of the statute cujus ad collegia G collatio pertinet, but it is not so. Those words and that statute are to be construed of livings where not only the legal estate, but also the trust and equitable ownership, belongs to the college absolutely, whereas in this case, though the legal estate of the advowson is in the college as a corporate body, it is on special trust for a particular person described, which puts an end to the visitor's power over it, for that should not set up a different rule in equity from what would be at law H as to the legal estate under like circumstances. Suppose, after the foundation of this college the Crown had granted an advowson or land to the senior fellow of the college, this grant would have operated to make the senior fellow a sole corporation according to 4 Leon. 190 [*Dean and Chapter of Christ Church and Parotts Case* (3)], which was admitted in *Cambridge University* v. *Crofts* (4), in the King's Bench in 1714. The bishop could not take away the legal estate I vested in a sole corporation, although it happened to be part of the aggregate body, and give it to the aggregate body.

As to the fourth, it is admitted for the defendant that, if the devise had been to a stranger on the same trust, the visitor could have no power over it. The equitable must be like the legal, only the college would be obliged to apply to this court to compel the trustees to execute. It cannot alter the case that the corporation of the college happened to be the trustees. Suppose it had been on trust to present a member of another college, the visitor of this could have no power over it, and the present case differs not in substances from that. On the first branch of

this trust and on the last, where it is to present to a stranger, it is admitted, the visitor could have no power, but it is contended for over the intermediate branch, because among the members of the college subject to his jurisdiction, and is compared to the case of a particular estate to the college, remainder over. But that is not like this case, the college there having the absolute ownership during its continuance, here not. Suppose on a vacancy all the fellows in their turn should do an act which the master and major part of the fellows should conceive to be an absolute refusal, and should thereon seal a presentation to a stranger, and before institution one of the fellows should allege that in fact he had not refused, that the college mistook, and should present him, and he appealed to the visitor upon their rejecting his claim, the visitor could not judge of this, there intervening the right of a stranger not subject to the visitor's jurisdiction, whom he could not compel to give up his presentation. Therefore, none but one of the King's courts of equity could judge, if it was a binding refusal, or could give relief. Suppose a fellow completely entitled should at the end of the year refuse to resign. The visitor could not compel him, for he could compel only for breach of the statute, which this is not. Application for relief must be to some court of general jurisdiction, who may decree a resignation of the fellowship or living, and enforce the decree under the general penalties of contempt, so that this argument for defendant turns the other way.

I admit that in *Philips* v. *Bury* (2) contumacy was held good cause of expulsion, and the Court of King's Bench would not examine into the fact of that contumacy, which was right, but it appeared to be a contumacy within the bishop's jurisdiction, which must be shown, although the contumacious fact need not be specially shown. But admitting for argument's sake (and not otherwise) that that need not appear in expulsion for contumacy, it does not follow that because a person may take advantage of general pleading to cover a nullity of jurisdiction, he, therefore, will. I am sure the present bishop would scorn to take such advantage, if it might be taken. But we are not now on a case of expulsion. It is sufficient to show that the visitor, although general, could not give an adequate remedy in many cases on this trust, and the case of Eton College, *R.* v. *Bland* (5), is an authority, where the court held that the bare averment of a visitor would not preclude the jurisdiction of the court, but the extent of his authority must appear, that the court may be satisfied he can do complete justice, and, therefore, a mandamus was awarded.

As to the fifth, whoever has a right by this trust, must have remedy, and I have shown that the bishop has no power to give it. It is admitted that after the testator's death, a bill might be filed to establish this charity and carry this trust into execution, and the visitor would have no jurisdiction. The court must then have decreed for a performance according to the will; and supposing a question had then arisen at the Bar on the construction of the words of the will "senior divine then fellow," the court must have determined that and have laid down rules for execution of the trust by the college in all future times, which would have been binding to the college, the visitor, and all persons. The ground of this is that there must have been a complete performance, and there is no instance of this court's decreeing a trust by piecemeal or parts. Nor is it any answer to say that no such decree has been made, for the legal estate is in the trustees, and this trust is for ever executory, and always subject to be so until determined in equity. Therefore, such a construction may be made at any time. The reason of *R.* v. *St. John's College, Cambridge* (6), is very material. It might be said there, as has been here, that this is a power superadded and annexed to the visitor's. The court said there that it arose on the public laws of the land. The only difference between the two cases is that that arose on a public Act of Parliament relating to government; this on the general rules of equity, which is part of the general law of the kingdom. It is said that new donations may be subject to the visitor's jurisdiction, as it has been held that new engrafted fellows may, but that is not ad idem, for this is founded on a new donation and special trust. The case urged

for this is that of Clare Hall, *A.-G.* v. *Talbot* (7) (long after *Jennings of Clare Hall Case* (8)) where I allowed the plea.

I am not an enemy in general to visitatorial power, but incline to support it as far as necessary, and went there further than Sir John Holt, C.J., did in *Clare Hall Case* (8), but the reasons, on which I founded myself there do not hold here. There was a plain implication to subject to the general visitatorial power to avoid confusion, which would arise if everyone coming in as a fellow should not be subject to college discipline, and in *R.* v. *All Souls College, Oxford* (9) it is determined that power of expulsion includes power of admission. I there, indeed, laid weight on the inconveniences which might arise from a different decision, which were obvious, but different from the present, for it is not so necessary in this case that every special trust, consisting of various parts, should be subject to the jurisdiction of the visitor, nor will the like confusion ensue. The visitatorial power, as allowed and established by the law of England, and on the grounds on which it is established, is most useful in colleges and learned societies, and I am for supporting it as far as it is established by the constitution of this kingdom, particularly by the judgment in Exeter College's Case [*Phillips* v. *Bury* (2)], but I am not for extending it further, much less for giving way to and extending it on principles and rules derived from foreign laws which the law of England rejects. I concur on the whole that the plea should be overruled.

Judgment for plaintiff.

ZOUCH d. ABBOTT AND HALLET *v.* PARSONS

[Court of King's Bench (Lord Mansfield, C.J., Wilmot, Yates and Aston, JJ.), November 23, 1765]

[Reported 3 Burr. 1794; 1 Wm. Bl. 575; 97 E.R. 1103]

Infant—Contract—Avoidance—Protection against incapacity due to lack of experience—Contract for infant's benefit—Acts under authority infant trusted to exercise—Protection "a shield, not a sword."

While the law protects an infant against the incapacity and imprudence which results from his lack of experience, and for that purpose renders void or voidable contracts into which he enters, an infant is enabled to do binding acts which are for his own benefit, and, without prejudice to himself, for the benefit of others. Acts which do not touch the infant's interest, but take effect from an authority which he is trusted to exercise are binding. The protection afforded to infants is (per Lord Mansfield, C.J.) given as a shield and not a sword and is never to be turned into an offensive weapon of fraud or injustice.

In the present case the conveyance of an infant mortgagee on repayment of the mortgage money was **held** to be binding.

Infant—Lease—Power to grant—Avoidance

A lease granted by an infant is void if it is to the prejudice of the infant, and in any case is voidable by the infant on attaining full age. The lessee cannot in any case avoid the lease on the ground of the infancy of the lessor.

Lease—Surrender—Grant of new lease—Invalidity of new lease.

Per Lord Mansfield, C.J.: The surrender of a lease, express or implied, in consideration of the grant of a new lease would not be binding if the new lease were void, for the cause, ground, and condition of the surrender fails.

Notes. Considered: —— v. *Handcock* (1810), 17 Ves. 383; *Baylis* v. *Dineley* (1815), 3 M. & S. 477; *Burnaby* v. *Equitable Reversionary Interest Society* (1885), 28 Ch.D. 416. Applied: *Carter* v. *Silber*, *Carter* v. *Hasbuck* [1892] 2 Ch. 278. Considered: *Re Shephard*, *Shephard* v. *Cartwright*, [1953] 2 All E.R. 608. Distinguished: *Chaplin* v. *Leslie Frewin* (*Publishers*), *Ltd.*, [1965] 3 All E.R. 764. Referred to: *Maddon* v. *White* (1787), 2 Term. Rep. 159; *Doe d. Egremont* v. *Forwood* (1842), 3 Q.B. 627; *Nelson* v. *Stocker* (1859), 32 L.T.O.S. 368 (see [1843–60] All E.R.Rep. 865, C.A.); *Thurstan* v. *Nottingham Permanent Benefit Building Society*, [1902] 1 Ch. 1; *R. Leslie, Ltd.* v. *Shiell*, [1914–15] All E.R. Rep. 511.

As to the legal capacity of infants, see 21 Halsbury's Laws (3rd Edn.) 134 et seq., and as to the surrender of leases see ibid., vol. 23, pp. 683–690. For cases see 28 Digest (Repl.) 486 et seq.; 31 Digest (Repl.) 565 et seq.

Cases referred to:

(1) *Conny's Case* (1611), 9 Co. Rep. 84 b; 77 E.R. 854; 28 Digest (Repl.) 543, *584.*

(2) *Holt* v. *Ward* (1732), 2 Stra. 937; 1 Barn.K.B. 455; 2 Barn.K.B. 176; Fitz-G. 175, 275; 93 E.R. 954; 27 Digest (Repl.) 23, *16.*

(3) *Pigot* v. *Russel* (1593), Cro. Eliz. 124; 78 E.R. 381; sub nom. *Piggot and Russel's Case*, 2 Leon. 108; 28 Digest (Repl.) 525, *412.*

(4) *Humphreston's Case* (1575), 2 Leon. 216; sub nom. *Lane* v. *Cowper*, Moore, K.B. 103; 72 E.R. 469; 28 Digest (Repl.) 545, *600.*

(5) *Lloyd* v. *Gregory* (1638), Cro. Car. 501; W.Jo. 405; 79 E.R. 1032; 28 Digest (Repl.) 543, *577.*

(6) *Thompson* v. *Leach* (1698), ante p. 39; Carth. 435; Comb. 468; 1 Com. 45; Holt, K.B. 357; 3 Lev. 284; 1 Ld. Raym. 313; 3 Mod. Rep. 301; 12 Mod. Rep. 173; 2 Salk. 427, 576, 618, 675; 3 Salk. 300; 2 Vent. 198; 90 E.R. 1097; sub nom. *Leach* v. *Thompson*, 1 Show. 296; sub nom. *Leech's Case*, Freem.K.B. 502; on appeal sub nom. *Leach* v. *Thompson*, Show. Parl. Cas. 150, H.L.; 28 Digest (Repl.) 494, *125.*

(7) *Whittingham's Case* (1603), 8 Co. Rep. 42b; 77 E.R. 537; 28 Digest (Repl.) 487, *44.*

(8) *Darcy* v. *Jackson* (1621), Palm. 224; 81 E.R. 1053; 28 Digest (Repl.) 487, *40.*

Special Case in ejectment.

John Bicknell, being seised in fee of the messuages and lands in the declaration mentioned, by indenture of lease and release dated Mar. 24, 1750, and Mar. 25, 1751, conveyed the premises to William Cook and his heirs by way of mortgage for securing the repayment of £280. William Cook died, leaving John Lamb Cook, an infant, his eldest son and heir-at-law, and also leaving his widow Elizabeth Cook, and the said John Lamb Cook his joint executors and residuary legatees.

John Bicknell, the mortgagor, brought the title deeds of the premises to one John Williams, an attorney, and desired him to procure the sum of £400 upon the same security, in order to pay off the mortgage to the Cooks, and for other purposes. Williams applied to the lessors of the plaintiffs who agreed to advance the same, and by indentures of lease and release bearing date June 29 and 30, 1761, between John Lamb Cook (then being an infant of between sixteen and seventeen years of age) and Elizabeth Cook, of the first part, John Bicknell, of the second part, and Henry Abbott and Catharine Hallett (lessors of the plaintiffs), of the third part, John Lamb Cook and Elizabeth Cook, in consideration of the sum of £280 in the release mentioned to be to them paid by the lessors of the plaintiffs, granted and released, and the said John Bicknell, as well for the consideration aforesaid, as for the further sum of £120 to him mentioned to be paid by the said lessors of the plaintiffs, granted, ratified, and confirmed the premises to Abbott and Hallett and their heirs to hold to them, their heirs and assigns, for ever.

When Williams drew the last-mentioned mortgage deed, he apprehended that

A the whole principal sum of £280 continued due to the representative of William Cook upon his mortgage, and, therefore, expressed that sum to be the consideration paid to them, but, in fact, the sum of £100 only principal money, and £9 for interest, then remained due thereon, William Cook having been paid the other £180 in his lifetime. Accordingly, at the time of the execution of the last-mentioned indentures of lease and release, Elizabeth Cook received £109 being the B principal and interest then remaining due to her son and her as representatives of her late husband upon his mortgage, and the residue of the sum of £400 was received by John Bicknell from the lessors of the plaintiffs.

John Bicknell continued in possession of the premises from the time of his conveyance thereof to William Cook until the year 1756 when he conveyed the premises by way of mortgage for £200 to one Thomas Thorne for a term of years. C In March, 1762, Thorne assigned the term to the defendant Henry Parsons in consideration of the sum of £228 in the deed of assignment mentioned to be the principal, interest and costs then due from Bicknell to Thorne, but before the assignment to the defendant, Williams, then being attorney for the lessors of the plaintiff, gave the defendant notice of the mortgage made to William Cook, and of the assignment of it to the lessors of the plaintiffs. On Mar. 27, 1764, two days D before the day of holding the assizes at Taunton, John Lamb Cook made an entry on the premises in order to avoid his said lease and release to the lessors of the plaintiffs. The question was whether the lessors of the plaintiffs were entitled to recover the premises.

Serjeant Glynn for the plaintiffs.
Dunning for the defendant.

E

Cur. adv. vult.

LORD MANSFIELD, C.J., delivered the resolution of the court as follows: The merits of this cause turn upon two general questions: (i) whether this conveyance is good, and binds the infant; (ii) if it does not bind the infant, whether the defendant can take advantage of the infancy, and on that account object to it.

F As to the first, miserable must the condition of minors be, excluded from the society and commerce of the world, deprived of necessaries, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their own G benefit, and, without prejudice to themselves, for the benefit of others.

To mention a rule or two, the reasons of which are applicable to the present case. If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him, as if he makes equal partition, if he pays rent, if he admits a copyholder upon a surrender. But there is no occasion to enumerate instances. The authorities are express, and the reason decisive:

H

> "Generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law:"

see Co. LITT. 172 a. The second resolution in *Conny's Case* (1) is

> "that although the infant in the case at Bar was not compellable to attorn, because the manor was not conveyed by fine; yet, because by a mean, he was I compellable to attorn, scilicet if a fine had been levied, the attornment was good."

FORTESCUE, C.J., lays it down larger in Y.B. 18 Hen. 6, fo. 2, a:

> "He did but that which he ought to do: therefore, the attornment is good."

> "The attornment of an infant to a grant by deed is good because it is a lawful act: albeit he be not, upon that grant by deed, compellable to attorn:"

Co. LITT. 315 a. The reason is manifest. A right and lawful act is not within

the reason of the privilege which is given to protect infants from wrong. His being compellable by any mean, or in any way to do it, proves the act to be substantially what he ought to do. In *Holt* v. *Ward* (2) the infant's being compellable by the ecclesiastical court would have answered the objection made there as much as her being compellable by the common law. Therefore, civilians were heard.

To what end should the law permit a minor to avoid an act which, in any way, through any means, by any jurisdiction, he might be compelled to do over again, after it was undone? It would be assisting him to vex and injure others, without the least benefit to himself.

Another rule which may be collected from the books is

> "that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise are binding."

As, where an infant patron presents; an infant executor duly receives and acquits, pays and administers the assets; an infant head of a corporation joins in corporate acts; an infant officer does the duty of an office which he may hold.

A third rule deducible from the nature of the privilege which is given as a shield and not as a sword is

> "that it never shall be turned into an offensive weapon of fraud or injustice."

As where tenant for life and infant in remainder levied a fine, the infant reversed the fine as to himself for the inheritance for nonage, yet he shall be bound by his assent to the fine and joining in it not to enter for the forfeiture. The fine was held good as to the estate of tenant for life and reversed quoad the infant only: *Pigot* v. *Russel* (3).

To see whether the reasons of these rules are applicable in the present case it is necessary to ascertain what is in truth the nature of this transaction. Part of the personal estate of William Cook consisted of £109 due from John Bicknell, secured by a mortgage in fee. His widow and infant son were joint executors and residuary legatees, and as such entitled to this money. The fee which descended to the son was merely as a pledge for the money. Besides the money the infant had no beneficial interest in the land whatsoever. Upon payment, he was bound to convey as the mortgagor should direct. Conveying is no more than delivering up a security when it is satisfied. The money here was paid to the proper hand. An adult, under the same circumstances, would have been guilty of a breach of trust if he had refused. He would have been compelled to do it, and would have been condemned in costs for refusing. By Act of Parliament 7 Anne, c. 19, s. 2 [repealed], the infant was compellable to do it during his minority. It is much stronger here, that the money was paid by the plaintiffs who, upon the faith of this conveyance and the title deeds produced by Bicknell, the mortgagor, advanced more money. The whole beneficial estate belonged to Bicknell after paying the £109. The infant's conveyance was matter of form, and in the nature of an authority, executed by Bicknell's direction, in favour of a third person who ventured his money upon the faith of it. It would be iniquitous in the infant to avoid it. It would be unjust to set up the privilege to make an innocent man lose his money, circumvented by his confidence in the infant's concurrence. But it could not even have that effect. It would be nugatory, and without any effect. For, if it was avoided, he must make the same conveyance over again. He would be compelled to do it. A conveyance to the defendant would be a breach of trust. The infant was expressly a trustee for the plaintiffs. He was paid by them. On the faith of the fee being in him, they advanced more money. If the fee was in a stranger, the plaintiffs have the prior equity. If Thorne had been prior, his letting the mortgagor have the title deeds might be sufficient to postpone him. And the defendant had express notice.

There can be no doubt that the infant was compellable to do what he has done. Upon the first question, we are all of opinion that this conveyance binds the infant.

A But supposing it not binding against him, or those who may stand in his place, the second question is whether the defendant can take advantage of the infancy; and, on that account, object to the conveyance. This depends upon two points, (i) whether this conveyance is void or voidable only; (ii) if voidable only, whether the infant, by his entry before the assizes had absolutely avoided it. It is not settled what is the true ground upon which an infant's deed is voidable only, B whether the solemnity of the instrument is sufficient, or it depends upon the semblance of benefit to the infant from the matter of the deed upon the face of it.

As to the first, the solemnity of the instrument, we think the law is as laid down by Perkins, (Profitable Book, ch. i, s. 12) that

> C "all such gifts, grants or deeds made by infants, which do not take effect by delivery of his hand, are void: but all gifts, grants or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate."

The words which do take effect are an essential part of the definition, and exclude letters of attorney or deeds which delegate a mere power and convey no interest.

D In Bro. Abr. title Dum fuit infra ætatem, pl. 1 (which cites Y.B. 46 Edw. 3, 34), it is noted

> "that a dum fuit infra ætatem was admitted to lie of a rent: and yet by some, the grant of an infant was void and not voidable."

But (says the book):

> E "it is not so: for then this action would not lie. And besides, the delivery of a deed cannot be void; but only voidable."

There is no difference in this respect between a feoffment and deeds which convey an interest. The reason is the same. The delivery of the deed must be in the presence of witnesses as much as the livery of seisin. The ceremony is as solemn. F The presumption that the witnesses would not attest if they saw him an infant holds equally as to both.

Littleton [Tenures, s. 259], who writes with great accuracy and precision, puts them both upon the same footing. He says:

> G "If before the age of twenty-one, any deed or feoffment, grant, release, confirmation, obligation or other writing be made by any of them . . . all serve for nothing, and may be avoided."

In 2 Co. Inst. 673 a bargain and sale enrolled by an infant is denied to be matter of record which the infant must avoid during his minority, but the book says: "He may avoid it when he will."

An infant, or they who stand in his place, cannot plead non est factum, and give H the infancy in evidence, but they must plead the infancy specially to avoid the deed, and that plea avoids it by relation back to the delivery. The reason of this is because it has an operation from the delivery and not because it has the form of a deed. The deed of a feme covert has the form, but she may plead non est factum; because it has no operation. The distinction between the deeds of femes-covert, and of infants, is important; the first are void; the second voidable.

I Perkins (Profitable Book), s. 154, says:

> "And it is to be known that a deed cannot have and take effect at every delivery, as a deed: for, if the first delivery take any effect, the second is void —as in case an infant makes a deed, and deliver the same as his deed, etc., and afterwards, when he comes of full age, delivers it again as his deed; this second delivery is void. But if a married woman deliver a bond unto me, or other writing, as her deed; this delivery is merely void: and, therefore, if after the death of her husband, she, being single, deliver the same again unto me, as her deed; the second delivery is good and effectual."

Two objections were made at the Bar, to this proposition at least, in its extent: (i) that leases by an infant, by deed, upon which no rent is reserved, are absolutely void; therefore, the criterion whether the deed is void or voidable does not depend upon the delivery, but upon the matter and contents, whether it may possibly be for the infant's benefit; (ii) a surrender by an infant by deed is absolutely void. Therefore, all deeds are not voidable only.

As to (i), there are many obiter sayings, but there is no sufficient authority clearly to outweigh the reasons against this position. I cannot find a case adjudged singly on this ground. What comes nearest to it is the opinion of WRAY, C.J., and SOUTHCOTE, J., against GAWDY, J., in *Humphreston's Case* (4) (Moore, K.B. at p. 105, and 2 Leon. 216). But there the judgment was upon the right and merits of the case, and not upon the point of the lease. The question as to the lease arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. WRAY, C.J., and SOUTHCOTE, J., held that no rent being reserved, there was no semblance of benefit to the infant, whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovering. Besides, the lease was by parol. But reason soon prevailed, and it has been long settled, that an infant may make a lease, without rent, to try his title. Very prejudicial leases may be made, although a nominal rent is reserved and there may be most beneficial considerations for a lease although no rent is reserved. What seems decisive is that the lessee can in no case avoid the lease on account of the infancy of the lessor, which shows it not to be void, but voidable only. And it is better for infants that they should have an election.

As to (ii), the authority of *Lloyd* v. *Gregory* (5) was cited: and sayings arguendo, in *Thompson* v. *Leach* (6). *Lloyd* v. *Gregory* (5) was determined upon the special verdict by three judges, of whom SIR WILLIAM JONES and CROKE were two. SIR WILLIAM JONES reports that the second lease being void made an end of the question; and that the judges gave no opinion upon the other points. The note in CROKE does not say a word of the only ground of the judgment, but rather supposes the second lease good by arguing that, there being no increase of term or diminution of rent, it had no semblance of benefit. CROKE's note might be confounded with what passed upon the trial at Bar for ROLLE states sayings to that effect upon the trial at Bar: 1 ROLL. ABR. 728, pl. 3. But SIR WILLIAM JONES is certainly right, for the second lease was void. And no surrender, express or implied, in order to or in consideration of a new lease would bind if the new lease is absolutely void, for, the cause, ground and condition of the surrender fails.

In *Thompson* v. *Leach* (6) (which was a most favourable case for the plaintiff) much is said in argument, to prove the surrender of an infant or lunatic to be void, to get rid of some doctrine laid down in *Whittingham's Case* (7) that the remainderman injured by the act could not avoid it. But more is said to overturn that doctrine. There is no difference in this respect between the heir in tail and the remainderman; neither claims under him whose act is in question, but both claim per formam doni. In *Darcy* v. *Jackson* (8) DODERIDGE, J., denies the doctrine and says: "He in remainder and the donor shall take advantage of infancy," which is agreeable to LITTLETON's reasoning (TENURES, s. 635):

> "It should seem against reason that a feoffment made by an infant shall grieve or hurt another, to take from them their entry . . ."

Suppose the comparison between an infant and a man non compos just (which it is not), the point of the surrender being void or voidable was not necessary to the judgment in that case.

I know of no judgment upon the ground that such a surrender is void. Most undoubtedly, the other party cannot say so. If an infant was to surrender an unprofitable lease, and, after acceptance, the premises should be burnt, overflowed, or otherwise destroyed, the lessor never could say the surrender was void. There is no instance where the other party to a deed can object on account of infancy. Consequently, the infant may let the surrender stand, or avoid it, which proves

A it to be voidable only. If a new case should arise where it would be more beneficial to the infant that the deed should be considered as void, if he might incur a forfeiture, or be subject to damages, or breach of trust, in respect of a third person, unless it was deemed void, the reason of the privilege would warrant an exception in such case to the general rule. Powers of attorney are an exception to the general rule as to deeds, and a power to receive seisin is an exception to
B that. The end of the privilege is to protect infants. To that object, therefore, all the rules and their exceptions must be directed.

But be the point upon the solemnity of the delivery as it may (for there are respectable sayings the other way), it is not necessary to our determination, for we are all of opinion that the £109 received, and the other circumstances of the transaction, show a semblance of benefit sufficient to make it voidable only upon
C the matter of the conveyance.

If it be voidable only, the second point is whether the infant, by his entry before the assizes (which appears to be during his minority) has avoided it. At the common law, the only conveyance in pais of the freehold and inheritance of land, with transmutation of possession, was by feoffment. If it was tortious the disseisee was obliged to enter, to re-vest his possessory title, and then he might
D bring an action of trespass. So, in the case of feoffments by an infant, he might enter during his minority to re-vest his possessory right for the sake of the profits, but still the feoffment was voidable only and he might elect to confirm it when he attained his full age. The reason why an infant cannot bring any writ analogous to a dum fuit infra ætatem, during his minority is that his election may not be found by the judgment. Whether an entry is of any use in the present case
E is not material; it is sufficient that it cannot have any larger effect than in the case of a feoffment. The infant is alive still a minor. The defendant cannot elect for him. He is a mere stranger in every view, and has no estate affected by the conveyance. We are all of opinion that the plaintiffs ought to recover. And it is well for the defendant that we are of this opinion. He would get nothing by defeating the plaintiffs here, for, finally, in another mode of proceeding the con-
F veyance must be confirmed, and the defendant would be to pay all the costs here and there. It is fortunate for the suitors on both sides when, consistent with rules and forms of proceeding, that justice, which must be the final determination of the question, may be done in the first stage of the litigation.

Judgment for plaintiffs.

A

THROCKMERTON *v.* TRACEY AND ANOTHER

[Court of Common Pleas (Robert Brooke, C.J., Staunford, Saunders and Sir Humphrey Browne, JJ.), Michaelmas Term, 1555]

[Reported 1 Plowd. 145; 2 Dyer, 124a; 75 E.R. 222]

B

Document—Construction—Deed—Effect to be given to intention of parties—Construction as a whole—Construction against grantor.

A deed is to be construed so as to give as much effect to the intention of the parties as the law permits. "The intent directs the gift more than the words": Bracton. A deed should not be avoided where the words may be applied to any intent to make it good. A deed must be construed as a whole, for, per Staunford, J., "every part of it ought to be compared with the other parts and one entire sense ought to be made." It should be taken most beneficially for the party to whom it is made, i.e., in the case of a deed of grant, but not unreasonably, against the grantor.

C

Notes. Considered: *Wrotesley* v. *Adams* (1560), 1 Plowd. 187. Referred to: *Lofield's Case* (1612), 10 Co. Rep. 106a; *Berry* v. *Perry* (1615), 3 Bulst. 62; *Miller* v. *Manwaring* (1635), post; *Berry* v. *White* (1662), O.Bridg. 82; *Petty* v. *Goddard* (1662), O.Bridg. 35; *Lyn* v. *Wyn* (1665), O.Bridg. 122; *Foote* v. *Berkley* (1666), O.Bridg. 527; *Fisher* v. *Wigg* (1700), 1 P.Wms. 14; *Doe d. Timmis* v. *Steele* (1843), 4 Q.B. 663; *Burchell* v. *Clark* (1876), 2 C.P.D. 88; *Hanson* v. *Newman*, [1934] Ch. 298.

D

As to the interpretation of deeds and other instruments, see 11 Halsbury's Laws (3rd Edn.) 381 et seq. For cases see 17 Digest (Repl.) 253 et seq.

E

Action brought by John Throckmerton against Richard Tracy and William Nicholson for the return of cattle detained by the defendants for damage feasant.

John Throckmerton sued a writ of second deliverance against Richard Tracy and William Nicholson, for taking his cattle on Mar. 26, 1553, at Beckford in a certain place called Didcote. The defendants said that the place in which the taking was supposed to be contained 100 acres of land with the appurtenances in Beckford, whereof Richard Tracy at the time of the taking was seised in fee. He in his own right avowed, and the said Nicholson as his bailiff acknowledged the taking of the cattle therein for damage feasant. Against this Throckmerton pleaded in bar to the avowry that long before Tracy had anything in the said land, one Henry, late abbot of the Monastery of St. Mary the Virgin, of Tewksbury in the county of Gloucester, was seised of one messuage and the said 100 acres of land, among other things, in Beckford aforesaid, in his demesne as of fee in right of his said Monastery. Being so seised, he, with the assent of the convent before the time when the taking is supposed to be, leased by deed the said tenements to John George, Dorothy his wife, and Joan their daughter for term of their lives. Afterwards the abbot with the assent of the convent, viz., on Sept. 20, 1525, at Tewksbury aforesaid, by their deed indented shown forth, delivered, granted and let to one John Smith and Margaret his wife the said tenements, among other things, by the name of the reversion of all and singular the messuages, lands, tenements, meadows and pastures of the abbot and convent in Didcote in the county of Gloucester, with all and singular their appurtenances, together with the chapel there being (all which John George, Dorothy his wife, and Joan their daughter, then held for term of their lives, and of the longest liver of them), to have and to hold the said messuages, lands, tenements, meadows, and pastures, together with the chapel with the appurtenances to the said John Smith and Margaret, and their assigns, from the feast of St. Michael the Archangel next following after the death, surrender or forfeiture of the said John George, Dorothy his wife, and Joan their daughter, or whensoever by any other means the reversion aforesaid should fall until the end of the term of 21 years thence next ensuing. By force whereof John Smith and Margaret were possessed of such interest and

F G H I

A term aforesaid of and in the said tenements, and, being so possessed, Dorothy and Joan died. John George survived them, and held himself in the said tenements, and was thereof sole seised in his demesne as of freehold by right of survivorship. On Oct. 10, 1537, at Tewksbury aforesaid, John Smith granted his estate and term in the said tenements to one William Cartwright and Henry Cartwright. The reversion of the said tenements came to King Henry VIII by surrender. On B June 6, 1542, John George died at Tewksbury aforesaid, after whose death, viz., on the next day after the feast of St. Michael then next following, William Cartwright and Henry Cartwright entered into the tenements. Afterwards Henry VIII granted the reversion of the said tenements to Richard Tracy in fee, and William Cartwright and Henry granted their estate and term in the said tenements to the plaintiff, by force whereof he entered into the said tenements and was possessed. C Being so possessed, he put his cattle in the place where they were when the defendants took them. The defendants demanded oyer of the deed of demise made to the aforesaid Smith and his wife, and it was read to them, and enrolled de verbo in verbum. The words were a demise of the reversion, habendum the said messuages, lands and tenements, from the feast of St. Michael next following after the death, surrender or forfeiture of John George, Dorothy, and Joan, or whenD soever by any other means the reversion should fall, until the end of 21 years thence next following. On this the defendants demurred in law.

Serjeants Walpole, Rastal, Rookby and *Gawdy* for the defendants.

Serjeants Prideaux, Bendloe, Robert Catline, Morgan, Richard Catline, Anthony Browne, and *Dyer*, for the plaintiff.

E **STAUNFORD, J.**, laid down three rules for the understanding of deeds. First, that they shall be taken most beneficially for the party to whom they are made. Secondly, that a deed shall never be void where the words may be applied to any intent to make it good, and upon this he cited BRACTON, who says: "benigne faciendæ sunt interpretationes instrumenti, ut res magis valeat quam pereat," and in another place he says: "in re dubia." Thirdly, that the words shall be F construed according to the intent of the parties, and not otherwise. Here he cited what BRACTON says: "Carta non est nisi vestimentum donationis," and the intent directs gifts more than the words. As if an annuity is granted pro consilio impendendo, and the grantee has divers faculties, yet the counsel shall be given in such faculty as was intended. So it is held in Y.B. 9 Edw. 4, fo. 22, pl. 24, that if a receiver is bound in an obligation to his master to pay him omnia recepta et G recipienda in his office, he is not thereby bound to pay all that he might receive, but only what he shall receive in fact so that the intent shall be pursued rather than the words. And where a man makes a lease of a house, so that the lessee may make his profit of the house, he may not throw down the house, nor commit waste therein by the opinion of the book, for the intent was otherwise, although the words may seem to favour that construction. Upon this last and the other H two rules he put several cases, and he said that to pursue the words is summum jus, which judges ought to avoid, and rather pursue the intent.

As to the principal matter, he said that a reversion has two intendments, the one is an estate left continuing during the particular estate, which is the most common sense, the other is the returning of the land after the particular estate ended, which is the natural sense of the word according to the definition of the I latin tongue, so that the reversion of the land and the land when it reverts is all one. The Statute of Westminster 2, c. 1, which says that they to whom the land was given under such condition, shall have no power to alienate the same, but that it shall revert unto the giver if issue fail, etc., intending to put a stop to the power of the donee from barring the donor of the reversion of the land, prohibits his alienation and directs that the land shall revert to the donor so that the reversion of the land and the land reverting is all one. In such sense the deed here is used, but if it had stopped in the first part, viz., in the premises, then it should have been taken merely as a grant of the reversion, but the habendum,

which is the other part, is such an addition as makes the clause but one in effect. As if I release all actions and stop there, all actions are gone, but if I say further "which I have as executor to J.S." there the generality is restrained. So in the case in Y.B. 7 Edw. 4, fo. 22, pl. 26, where the King had granted to Garter King of Heralds £10 for term of his life, if he had stopped there Garter King would have had it absolutely for the term of his life, but when he says further, "by reason of his office," thereby the generality of the grant is restrained, so that if he were removed from his office, he would lose the annuity. So it is in the case here, if the deed had stopped when the reversion was granted, it had been merely a reversion in the nature of a reversion commonly taken, but when it is said, habendum the land from the feast, etc., this is become annexed to the first part, and makes it but one entire deed, which ought to agree in itself, nam turpis est pars quæ cum sud toto non convenit.

Forasmuch as every part of the deed ought to be compared with the others, and one entire sense ought to be made thereof, to this end the three rules above stated are to be remembered, by the one of which the deed ought to be made void if any sense can be made of it, as there may here; by the second rule it shall be taken most beneficially for Smith and his wife; and by the third rule it shall be taken according to the intent of the parties. In order to accomplish these three rules the deed here ought to be taken as a good lease for 21 years after the first estate ended for such way the deed takes effect and shall be most beneficial for him to whom it is made, and shall enure according to the intent of the parties. In taking it in this sense the three rules are fulfilled.

SAUNDERS, J., said that deeds ought to have a reasonable exposition, which shall be without wrong to the grantor, and with the greatest advantage to the grantee. As if an abbot grants a corody [a right to free lodging] to one for him and his servant to sit at his mess, he may not bring one that has a noisome disease. So if one grants estovers to another out of his manor, he may not cut down fruit trees. So if one grants to another common in his land for all his cattle, yet he shall not have common for goats or geese which are things hurtful to the land. Wherefore there is a kind of equity in grants, that they shall not be taken unreasonably against the grantor, and yet shall with reason be extended most liberally for the grantee. As a release by the lessor of all this right made to the lessee for years shall enlarge his estate for his life, but if the grantor was tenant in tail, then it should only be for the life of the tenant in tail. So a grant of 20s. by two tenants in common out of their land shall enure as several grants, so that the grantee shall have 20s. of each. So in 34 Lib. Ass., pl. 11, where a man granted totam partem suam piscariæ de Tese quamdiu terræ suæ se extendunt, salvo tamen stagno molendini, there it is held that the fishery in the mill-pool should pass to the grantee, for the deed shall be taken most strongly against the grantor, so that the pool and not the fishery shall be excepted. Whence we may see that there is an equity in the exposition of deeds, and that they are taken most liberally for the grantees.

In the present case, he that has the reversion of the land dependant upon an estate for life is the proprietor of the land, and the tenant for life is the possessor, and the land is included in his Estate who is in the reversion and who is the proprietor of the land, for if one warrants the lands to him, he shall vouch, and if he that has the reversion, grants a rent out of the land or accepts a release of right in the land, it shall be good. His Lordship admitted the cases of 7 Edw. 4 [Y.B. 7 Edw. 4, fo. 20, pl. 20] and 30 Edw. 1 [cited in 1 Plowd. at p. 155; 2 Dyer, at p. 125, pl. 45], that a reversion shall pass by a grant of the land or of a mill. So he said that a grant of the land shall make a reversion to pass, and a grant of the reversion shall make the land to pass, and the nature of a habendum is to give, enlarge, or qualify, and the habendum here is good for the thing in substance was granted in the premises. Wherefore the premises and the habendum make a perfect demise, and the one with the other have the substance and

A intent of a lease. He said he was of the like opinion that Brudnel seemed to be of in 14 Hen. 8, fo. 22 A, that contracts shall be as it is concluded and agreed between the parties according as their intents may be gathered. To cavil about the words in subversion of the plain intent of the parties, as TULLY says in his BOOK OF OFFICES: "Est calumnia quædam et nimis callida sed malitiosa juris interpretatio, ex quo illud, summum jus, summa injuria." He puts an example B of one who had taken a truce for 130 days with his enemy, and in the night he destroyed and depopulated their possessions, because (as he said) the truce was for days and not for nights, which TULLY accounted mere injury and injustice. Such interpretation of the law he admonished men to avoid, and to observe and follow the intent of the words. Certainly the words are no other than the testimony of the contract. In the case here (as he apprehended) there are all the five C garments which BRACTON says are necessary for the clothing of contracts, as they are expressed in these verses (BRACT., lib. 2, cap. 5; Co. LITT. 36, a):

"Re, verbis, scripto, consensu, traditione,
Junctura, vestes sumere pacta solent."

For here is matter of substance, words, writing, consent and delivery, and then D it shall be a perfect contract, and consequently a lease. Therefore, HIS LORDSHIP was of opinion that the lease was good and that the plaintiff should recover. He put much other matter and many other cases in maintenance of his opinion.

SIR HUMPHREY BROWNE, J., agreeing, said that the intent of the abbot and convent and of Smith and his wife was to have the land pass as a lease after E the particular estate ended and not otherwise, and forasmuch as it was their intent that the word "reversion" should enure such way, it seemed to him that the law would warrant it. For the land is included in the reversion, which, if it was not, a man by a grant of the reversion could not have the land in possession after the particular estate ended. A feoffment of a carve [i.e., as much land as could be ploughed in one year with one plough, about 120 acres], habendum the manor F of D., is good if the carve constitutes the manor. And if land is parcel of an office, it shall pass by a grant of the office because it is included in the grant. So it is in the case of a grant of a reversion, and much more when it has a tendency to make the lease good. Therefore, he was of opinion that the plaintiff should recover.

ROBERT BROOKE, C.J., delivered a dissenting judgment on matters which G do not now call for report or affect the pronouncements regarding the interpretation of deeds by the other members of the court.

A

PARADINE *v.* JANE

[Court of King's Bench (Bacon and Rolle, JJ.), Michaelmas Term, 1647]

[Reported Aleyn, 26; Sty. 47; 82 E.R. 897]

Landlord and Tenant—Repair—Covenant—House struck by lightning or destroyed by enemies—Liability of tenant to repair—Liability for rent.

Contract—Impossibility of performance—Absolute promise—Liability of promisor.

Where the law creates a duty or charge and the party is disabled from performing it without any default in him and has no remedy over, there the law will excuse him. As in the case of waste if a house be destroyed by tempest or by enemies, the lessee is excused. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by contract.

Therefore, if the lessee covenants to repair a house, although it is burnt by lightning or thrown down by enemies, yet he ought to repair it, and so with a covenant to pay rent. The lessee is equally liable to pay the rent reserved although there is no express covenant, since the rent is a duty created by the parties upon the reservation. Another reason why the lessee must pay the rent is that as he is to have advantage of casual profits, so he must run the hazard of casual losses and not lay the whole burden upon his lessor.

Notes. The basic rule as to absolute contracts which is laid down in this case has been modified by the common law doctrine of frustration, but that doctrine has been generally held inapplicable to a contract which creates an estate by demise, as in this case.

Applied: *Monk* v. *Cooper* (1727), 2 Stra. 763. Considered: *Brown* v. *Quilter* (1764), Amb. 619. Applied: *Belfour* v. *Weston* (1786), 1 Term Rep. 310; *Bullock* v. *Dommitt* (1796), 6 Term Rep. 650. Considered: *Hare* v. *Groves* (1796), 3 Anst. 687; *Hadley* v. *Clarke* (1799), 8 Term Rep. 259; *Atkinson* v. *Ritchie*, [1803–13] All E.R.Rep. 586; *Medeiros* v. *Hill* (1832), 8 Bing. 231. Approved: *Clark* v. *Glasgow Assurance Co.* (1854), 1 Macq. 668. Considered: *Hall* v. *Wright*, [1843–60] All E.R.Rep. 734; *Clifford* v. *Watts* (1870), L.R. 5 C.P. 577. Applied: *Redmond* v. *Dainton*, [1920] 2 K.B. 256. Considered: *Matthey* v. *Curling*, [1922] All E.R.Rep. 1. Referred to: *Touteng* v. *Hubbard* (1802), 3 Bos. & P. 291; *Beale* v. *Thompson* (1803), 3 Bos. & P. 405; *Hart* v. *Windsor*, [1843–60] All E.R.Rep. 681; *Spence* v. *Chodwick*, [1843–60] All E.R.Rep. 639; *Denton* v. *Great Northern Rail. Co.* (1856), 2 Jur.N.S. 185. *Adams* v. *Royal Mail Steam-Packet Co.* (1858), 5 C.B.N.S. 492; *Brown* v. *Royal Insurance Co.* (1859) 28 L.J.Q.B. 275; *Brown* v. *London Corpn.* (1861), 9 C.B.N.S. 726; *Lloyd* v. *Guibert* (1865), L. R. 1 Q.B. 115; *Coward* v. *Gregory* (1866), 15 L.T. 279; *Carstairs* v. *Taylor* (1871), L.R. 6 Exch. 217; *The Teutonia* (1871), L.R. 3 A. & E. 394; *Nichols* v. *Marsland* (1876), 46 L.J.Q.B. 174; *River Wear Comrs.* v. *Adamson*, [1874–80] All E.R.Rep. 1; *Sheffield Waterworks Co.* v. *Carter*, *Same* v. *Brooks* (1882), 8 Q.B.D. 632; *Jacobs, Marcus & Co.* v. *Crédit Lyonnais*, [1881–5] All E.R.Rep. 151; *Re Shipton, Anderson and Harrison's Arbitration* [1915] 3 K.B. 676; *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916–17] All E.R.Rep. 104; *Leiston Gas Co., Ltd.* v. *Leiston-cum-Sizewell U.D.C.*, [1916–17] All E.R.Rep. 329; *Blackburn Bobbin Co.* v. *Allen*, [1918] 1 K.B. 540; *Ralli Bros.* v. *Compañia Naviera Sota y Aznar*, [1920] All E.R.Rep. 427; *Great Western Rail. Co.* v. *Mostyn (Owners)*, *The Mostyn*, [1927] All E.R.Rep. 113; *Walton Harvey, Ltd.* v. *Walker and Homfrays, Ltd.*, [1930] All E.R.Rep. 465; *Broome* v. *Pardess Co-operative Society of Orange Growers (Established* 1900), *Ltd.*, [1940] 1 All E.R. 603; *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corpn., Ltd.*,

A [1941] 2 All E.R. 165; *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; *Hong Kong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisa, Ltd.*, [1962] 1 All E.R. 474.

As to nature and reservation of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 536 et seq.; and for cases see 31 DIGEST (Repl.) 278. As to impossibility of performance of contract arising subsequent to contract, see 8 HALSBURY'S LAWS (3rd Edn.) B 178 et seq.; and for cases see 12 DIGEST (Repl.) 47 et seq.

Cases referred to:

(1) *Anon.* (1537), 1 Dyer, 33 a; 73 E.R. 72; 12 Digest (Repl.) 428, *3293.*

(2) *Southcote's Case* (1601), 4 Co. Rep. 83 b; 76 E.R. 1061; sub nom. *Southcot* v. *Bennet*, Cro. Eliz. 815; 3 Digest (Repl.) 66, *78.*

(3) *Richards le Taverner's Case* (1543), 1 Dyer, 56 a.

C

Action of debt for rent due for lands let to the defendant, Jane. The plaintiff declared upon a lease rendering rent quarterly, and for rent in arrears for three years ending Lady Day, 1646.

The defendant pleaded that a German prince, Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an army of men, D and with the same force had entered upon the lands let by the plaintiff to the defendant and had expelled him therefrom, and held him out of possession from July, 1642, until Lady Day, 1646, whereby he could not take the profits. To this plea the plaintiff demurred.

PER CURIAM: The plea was resolved insufficient on the following grounds: first, E because the defendant had not answered to one quarter's rent; secondly, he had not averred that the army were all aliens, which shall not be intended, and then he has his remedy against them; and BACON, J., cited Y.B. 33 Hen. 6, fo. 1, pl. 3, where the gaoler in bar of an escape pleaded that alien enemies broke [into] the prison, etc., and an exception was taken to it, for that he ought to show of what country they were, i.e., Scots.

F Thirdly, it was resolved that the matter of the plea was insufficient, for although the whole army had been alien enemies, yet the defendant ought to pay the rent. This difference was taken, that where the law creates a duty or charge, and the party is disabled from performing it without any default in him, and has no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused: *Anon.* (1); Co. G INST. 53 d., 283a; Y.B. 12 Hen. 4, fo. 5, pl. 11. So of an escape: *Southcote's Case* (2) (4 Co. Rep. at p. 84 b); Y.B. 33 Hen. 6, fo. 1, pl. 3. So in Y.B. 9 Edw. 3, fo. 16, pl. 30, a supersedeas [a writ which put an end to a proceeding] was awarded to the justices that they should not proceed in a cessavit [a writ which enabled a lessor to recover lands where the tenant had neglected to perform the services for two years] upon a lessor during the war. But when the party by his H own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract. Therefore, if the lessee covenants to repair a house, although it is burnt by lightning or thrown down by enemies [but see now Landlord and Tenant (War Damage) Acts, 1939 and 1941] yet he ought to repair it: *Anon.* (1); Y.B. 40 Edw. 3, fo. 6.

I The rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it there would have been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations. This reservation, then, being a covenant in law and whereupon an action of covenant has been maintained (as ROLLE, J., has said) it is all one as if there had been an actual covenant. Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses

and not lay the whole burden of them upon his lessor. *Richards le Taverner's Case* (3) was cited for this purpose, that though the land be surrounded or gained by the sea or made barren by wildfire, yet the lessor shall have his whole rent.

Judgment for plaintiff.

GREEN AND ANOTHER *v.* FARMER AND OTHERS

[Court of King's Bench (Lord Mansfield, C.J., Yates, Aston and Willes, JJ.), May 6, 1768]

[Reported 4 Burr. 2214; 1 Wm. Bl. 651; 98 E.R. 154]

Lien—Work done—Right to retain goods for debt due on another transaction. Merchants having bought cloth from the plaintiffs and sent it to the defendants for dyeing became insolvent and agreed to return it to the plaintiffs, who tendered the cost of dyeing and requested the return of the cloth from the defendants. The defendants refused to return it unless a further debt due to them from the insolvent merchants was paid. There was no evidence of a general custom or trade usage, and in dealings by and between the same parties such a general lien had not been asserted.

Held: the defendant's lien was limited to their charges for work done on the cloth the return of which was now sought.

Notes. Followed: *Bennett* v. *Johnson* (1784), 2 Chit. 455. Applied: *Webb* v. *Fox* (1797), Peake, Add. Cas. 167; *Savill* v. *Barchard* (1801), 4 Esp. 53. Followed: *Re Witt, Ex parte Shulbrook* (1876), 2 Ch.D. 489. Referred to: *Kirkman* v. *Shawcross*, [1775–1802] All E.R.Rep. 84; *Houghton* v. *Matthews* (1803), 3 Bos. & P. 485; *Young* v. *Bank of Bengal* (1836), 1 Deac. 622; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; *Barnett* v. *Brandao* (1843), 6 Man. & G. 630.

As to general liens, how arising, see 24 Halsbury's Laws (3rd Edn.) 143; and for cases see 32 Digest (Repl.) 277 et seq.

Cases referred to:

(1) *Re Matthews, Ex parte Ockenden* (1754), 1 Atk. 235; 26 E.R. 151, L.C.; 32 Digest (Repl.) 291, *370.*

(2) *Ex parte Deeze* (1748), 1 Deac. 684, n.; 1 Atk. 228, cited in 4 Burr. at p. 2222; 26 E.R. 146, L.C.; 32 Digest (Repl.) 279, *261.*

Also referred to in argument:

Demainbray v. *Metcalfe* (1715), 2 Vern. 691; 1 Eq. Cas. Abr. 324; Gilb. Ch. 104; Prec. Ch. 419; 23 E.R. 1048, L.C.; subsequent proceedings, 2 Vern. 698, L.C.; 35 Digest (Repl.) 496, *1825.*

Chapman v. *Derby* (1689), 2 Vern. 117; 23 E.R. 684; 4 Digest (Repl.) 451, *3951.*

Stone v. *Lingwood* (1725), 1 Stra. 651; 93 E.R. 759; 32 Digest (Repl.) 286, *319.*

Cruger v. *Wilcox* (1755), 1 Dick. 269; 21 E.R. 272; sub nom. *Kruger* v. *Wilcox*, Amb. 252; 1 Keny 32, L.C.; 32 Digest (Repl.) 268, *146.*

Foxcroft v. *Devonshire* (1760), 2 Burr. 931; 1 Wm. Bl. 193; 97 E.R. 638; 5 Digest (Repl.) 987, *7961.*

Ex parte Shank (1754), 1 Atk. 234; 26 E.R. 151, L.C.; 42 Digest (Repl.) 1099, *9131.*

Action of trover for several parcels of serge and rackers, tried before Lord Mansfield, C.J., at Guildhall at the sittings after Trinity Term, 1767, when a

A verdict was found for the plaintiffs subject to the opinion of the Court of King's Bench on a Special Case.

The Case stated the following facts. A number of parcels of serge and rackers were purchased by Messrs. Heinzleman through their packer from the plaintiffs and delivered to the defendants on July 12, 1766, to be dyed. Later Messrs. Heinzleman, becoming insolvent, agreed with the plaintiffs that the goods should be B returned, and the plaintiffs requested them from the dyers, offering to pay what was due for dyeing them. The dyers insisted on payment of a further debt due to them from Messrs. Heinzleman for other dyeing work. After notice of the insolvency, however, the defendants had delivered to Messrs. Aston and Hodgson 11 pieces of material, bought from that firm by Messrs. Heinzleman, on payment merely of the charge for dyeing those pieces, and delivered to the plaintiff five C pieces undyed without any payment.

The goods in respect of which this further debt to the defendants from Messrs. Heinzleman arose had been sent to them, dyed and returned on the dates specified in their account, without the defendants retaining or having in their possession any other goods, and the charges for dyeing them arose from Jan. 1, 1766, to June 10, 1766, and before July 12, 1766. There were several periods during which D the defendants had no goods in their hands.

A verdict was found for the plaintiff for £57 (the value of the cloth undyed) and 40s. costs, subject to the opinion of the court on the question whether in the circumstances above stated the defendants had a lien on the goods for more than the price of dyeing them.

E *Dunning* for the plaintiffs.
Eyre for the defendants.

LORD MANSFIELD, C.J., delivered the following judgment of the court: The case is the same as if the action had been brought by Messieurs Heinzleman, for the plaintiffs stand in their place. And so I shall consider it. The general question is whether the plaintiffs in this action should be obliged to do justice F to the defendants by paying what is due to them before they are entitled to demand the goods from them, and to recover their value in case of refusal.

Natural equity says that cross-demands should compensate each other, by deducting the less sum from the greater and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said that each must sue and recover separately in G separate actions.

It may give light to this case and the authorities cited if I trace the law relative to the doing complete justice in the same suit, or turning the defendant round to another suit, which under various circumstances may be of no avail.

Where the nature of the employment, transaction or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits, it is H certain that only the balance can be the debt; and by the proper forms of proceeding in courts of law or equity the balance only can be recovered. After a judgment or decree "to account," both parties are equally actors. Where there were mutual debts unconnected, the law said they should not be set off; but each must sue. And courts of equity followed the same rule, because it was the law. For had they done otherwise, they would have stopped the course of law in all cases where I there was a mutual demand.

The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by the Bankrupts Act, 1705, s. 11, and Bankrupts Act, 1732, s. 28 [both repealed]. This clause must have, everywhere, the same construction and effect, whether the question arises upon a summary petition or a formal bill or an action at law. There can be but one right construction, and, therefore, if courts differ, one must be wrong. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring that Parliament interposed by the Insolvent Debtor's Relief Act, 1729,

and the Set-Off Act, 1735, s. 5 [both repealed]. But the provision does not go to goods or other specific things wrongfully detained; and, therefore, neither courts of law nor equity can make the plaintiff who sues for such goods pay first what is due to the defendant except so far as the goods can be construed a pledge. Then the right of the plaintiff is only to redeem. The convenience of commerce and natural justice are on the side of liens and, therefore, of late years courts lean that way: (i) where there is an express contract; (ii) where it is implied from the usage of trade, or (iii) from the manner of dealing between the parties in the particular case; (iv) where the defendant has acted as a factor.

Ex parte Ockenden (1) was well considered. LORD HARDWICKE's bias was strong on behalf of liens, and his own determination in *Ex parte Deeze* (2) had been almost in point. Yet he took time to consider it [i.e., *Ex parte Ockenden* (1)] and search for precedents. After consideration he thought he could not construe it within the mutual credit clause of the Bankrupt Act unless it could be so construed in an action of trover. (That is certainly so.) He rested upon there being no room, in that case, to imply a lien from usage of trade or from the particular manner of dealing.

Ex parte Ockenden (1) and *Ex parte Deeze* (2) are well reported in ATKYNS, but I will read you my note of both. [HIS LORDSHIP read his own note of *Ex parte Ockenden* (1), and continued:] This was in August, 1754, and it stood over to Dec. 20, 1754, and no precedents being found, LORD HARDWICKE determined according to his opinion in August as reported by ATKYNS. No precedents are cited since Dec. 20, 1754.

HIS LORDSHIP then read his own note of *Ex parte Deeze* (2), on the bankruptcy of Norton Nicholls: "That the assignees could not take the goods from the petitioner, without making satisfaction for the whole of his debt. As to a lien in that case, from the nature and course of dealing, the evidence is not clear." The opinion was "that the petitioner should be paid his debt, before the goods were taken out of his hands." Though LORD HARDWICKE took notice of the evidence of usage, he said it was not very clear. He thought it hard that mutual credit should only relate to pecuniary demands though goods can only be paid for in money and in that case there was an account between the parties; wine on one side, and package on the other. I have inquired into *Ex parte Deeze* (2), and the affidavit of the book-keeper. If the usage there stated be true; the packer was in the nature of a factor and as such had a lien for the general balance. It was settled in 1755 "that a packer, being in the nature of a factor, would be entitled to a lien."

Apply this to *Ex parte Ockenden* (1), and to the present case. In this case, the defendant acts in no respect as a factor; but merely as a manufacturer, to dye. There is no express contract "to pledge," no usage of trade; no argument from their particular dealing; on the contrary, it appears that he trusted to Messieurs Heinzleman's personal credit only. The defendants never detained any goods to answer their debt; but, from Jan. 1 to June 10 gave all back for the dyeing of which they now claim to detain without having any new cloths sent in. After notice of the failure of Heinzleman, they delivered eleven pieces to Aston and Hodgson, without a claim.

It is sufficient that no contract can be implied to give a lien for the balance from any usage of trade or manner of dealing; but it is much stronger when the manner of dealing shows the contrary, and that the defendants relied on personal credit only.

Therefore, we are all of opinion that there is no lien here beyond that which is given by the general rule of law which never was disputed.

Judgment for plaintiffs, the price of dyeing deducted at the time of taking the verdict; the value of the goods in white [i.e., undyed] being only thereby given to the plaintiffs.

A

ROBINSON *v.* BLAND

[Court of King's Bench (Lord Mansfield, C.J., Denison and Wilmot, JJ.), November 15, 1760]

B [Reported 2 Burr. 1077; 1 Wm. Bl. 234, 256; Bull.N.P. 275; 97 E.R. 717]

Conflict of Laws—Contract—Foreign contract—Construction—Performance in England—Construction according to English law.

The construction of a contract entered into abroad must, as a general rule, be governed by the law of the place where the contract was made, not where C an action to enforce it is brought. But where at the time of making the contract the parties contemplated its execution in a different country, so that the subject matter relates locally to that country, is construction will depend on the law of that country.

Accordingly, where a person in France gave to another a bill of exchange D which was payable in England,

Held: the interpretation of the bill must be according to English law.

Per Lord Mansfield, C.J.: A conveyance or will of land situate in England, a mortgage of such land, a contract concerning stocks in England, must all be sued on in England.

E *Conflict of Laws—Contract—Foreign contract—Immoral or illegal consideration —Enforcement.*

Per Curiam: An English court will not enforce a contract made in a foreign country for the payment of a gaming debt, and *semble* a contract based on any immoral or illegal consideration.

Notes. Considered: *Wilkinson* v. *L'Eaugier* (1836), 2 Y. & C. 363; *Applegarth* F v. *Colley* (1842), 10 M. & W. 723; *Daintree* v. *Hutchinson* (1842), 11 L.J.Ex. 397. Followed: *Moulis* v. *Owen*, [1907] 1 K.B. 746. Considered: *Saxby* v. *Fulton*, [1908–10] All E.R.Rep. 857. Followed: *Société Anonyme des Grands Etablissements de Touquet Paris-Plage* v. *Baumgart*, [1927] All E.R.Rep. 280. Considered: *Carlton Hall Club, Ltd.* v. *Laurence*, [1929] All E.R.Rep. 605. Referred to: *Bigg* v. *Lawrence* (1789), 3 Term Rep. 454; *Leapridge* v. *King* (1795), Peake, G Add. Cas. 32; *Calton* v. *Bragg* (1812), 15 East, 223; *M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434; *Re Trye, Ex parte Guillebert* (1838), 7 L.J.Bcy. 25; *Quarrier* v. *Colston* (1842), 1 Ph.147; *Allen* v. *Kemble* (1848), 6 Moo.P.C.C. 314; *Brook* v. *Brook* (1858), 3 Sm. & G. 481; *Jacobs, Marcus & Co.* v. *Crédit Lyonnais*, [1881–5] All E.R.Rep. 151; *Re Missouri S.S. Co.* (1889), 42 Ch.D. 321; *Com-* H *panhia de Moçambique* v. *British South Africa Co.*, *De Sousa* v. *British South Africa Co.*, [1892] 2 Q.B. 358; *Kaufman* v. *Gerson*, [1903] 2 K.B. 114; *C.H.T., Ltd.* v. *Ward*, [1963] 3 All E.R. 835.

As to the enforcement of foreign contracts, see 7 Halsbury's Laws (3rd Edn.) 69 et seq.; and for cases see 11 Digest (Repl.) 420 et seq.

I Cases referred to:

(1) *Slater* v. *Emerson* (1727), unreported.

(2) *Barjeau* v. *Walmsley* (1746), 2 Stra. 1249; 93 E.R. 1161; 25 Digest (Repl.) 438, *198.*

(3) *Champant* v. *Lord Ranelagh* (1700), Prec. Ch. 128; sub nom. *Lord Ranelaugh* v. *Champante*, 2 Vern. 395; 1 Eq. Cas. Abr. 289.

(4) *Curenden Parish* v. *Laland, Lancashire, Parish* (1731), 2 Stra. 903; 93 E.R. 929; sub nom. *Courland* (*Inhabitants*) v. *Iceland* (*Inhabitants*), 1 Barn.K.B. 466; sub nom. *Cuerden Parish* v. *Laland*, 2 Sess. Cas.K.B. 167; 1 Bott, 517.

Also referred to in argument:

Dawes v. *Painter* (1674), 1 Freem.K.B. 175; 89 E.R. 126; sub nom. *Daws* v. *Paynter*, 3 Keb. 26; sub nom. *Daws* v. *Pindar*, 2 Mod. Rep. 45; 8 Digest (Repl.) 773, *411.*

Blankard v. *Galdy* (1693), 2 Salk. 411; 4 Mod. Rep. 215; Holt, K.B. 341; Comb. 228; 91 E.R. 356; 8 Digest (Repl.) 768, *347.*

Foubert v. *Turst* (1703), 1 Bro. Parl. Cas. 129; 2 Eq. Cas. Abr. 475; 1 E.R. 464; sub nom. *Feaubert* v. *Turst*, Prec. Ch. 207, H.L.; 11 Digest (Repl.) 494, *1154.*

Fremoult v. *Dedire* (1718), 1 P.Wms. 429; 24 E.R. 458.

Earl of Dungannon v. *Hackett* (1702), 1 Eq. Cas. Abr. 288; 21 E.R. 1051; 35 Digest (Repl.) 224, *274.*

Ellis v. *Lloyd* (1701), 1 Eq. Cas. Abr. 289; 21 E.R. 1052.

Lane v. *Nichols* (undated), 1 Eq. Cas. Abr. 388; 21 E.R. 1051; 35 Digest (Repl.) 224, *275.*

Harvey v. *East-India Co.* (1700), 2 Vern. 395; 1 Eq. Cas. Abr. 288; 23 E.R. 856; 35 Digest (Repl.) 224, *276.*

Beven v. *Clapham* (1664), 1 Lev. 143; 83 E.R. 339; sub nom. *Bevin* v. *Chapman*, 1 Sid. 228; 1 Keb. 799; 32 Digest (Repl.) 408, *322.*

Davis v. *Yale* (1699), 2 Lut. 946; 125 E.R. 528; 32 Digest (Repl.) 408, *320.*

Dupleix v. *De Roven* (1705), 2 Vern. 540; 23 E.R. 950; 11 Digest (Repl.) 527, *1396.*

Tourton v. *Flower* (1735), 3 P.Wms. 369; 24 E.R. 1105; 22 Digest (Repl.) 246, *2997.*

Hussey v. *Jacob* (1696), Carth. 356; 1 Com. 4; Holt, K.B. 328; 1 Ld. Raym. 87; 5 Mod. Rep. 175; 12 Mod. Rep. 96; 1 Salk. 344; 88 E.R. 1189; 6 Digest (Repl.) 141, *1018.*

Bowyer v. *Bampton* (1741), 2 Stra. 1155; sub nom. *Boyer* v. *Bampton*, 7 Mod. Rep. 334; 93 E.R. 1096; 6 Digest (Repl.) 141, *1020.*

Pipon v. *Pipon* (1744), Amb. 25, 799; 9 Mod. Rep. 431; 27 E.R. 14, 507; sub nom. *Pippon* v. *Pippon*, Ridg. temp. H. 165, L.C.; 11 Digest (Repl.) 397, *525.*

Case Reserved at nisi prius at Westminster Hall, before Lord Mansfield, C.J.

The action was upon several promises, and the declaration contained three counts. The first count was upon a bill of exchange drawn at Paris by the intestate Sir John Bland on Aug. 31, 1755, and bearing that date, on himself in England for the sum of £672 sterling, payable to the order of the plaintiff, Palmes Robinson, ten days after sight, value received and accepted by Sir John Bland. The second count was for £700, moneys lent and advanced by the plaintiff to Sir John Bland, at his request. The third count was for £700, moneys had and received by Sir John Bland to and for the use of the plaintiff. The plaintiff's damage was laid at £800. The defendant, Anna Bland, the administratrix of Sir John Bland, pleaded the general issue, "that Sir John Bland did not undertake and promise, etc." Issue was joined thereon. The verdict was found for the plaintiff, and £672 given for damages, subject to the following Case stated for the opinion of the court.

The bill of exchange was given in Paris, for £300 there lent by the plaintiff to Sir John Bland at the time and place of play, and for £372 more lost at the same time and place, by Sir John Bland, to the plaintiff, at play. The play was very fair, and there was no imputation whatsoever on the plaintiff's behaviour. Several gentlemen and persons of fashion were then and there at play besides the plaintiff and Sir John Bland. In France, money lost at play, between gentlemen might be recovered as a debt of honour before the marshals of France, who could enforce obedience to their sentences by imprisonment, though such money was not recoverable in the ordinary course of justice. Money lent to play with, or at the time and place of play, might be recovered there as a debt in the ordinary course

A of justice, there being no positive law against it. The question was whether the plaintiff was entitled to recover anything and, if so, what, against the defendant.

Serjeant Hewitt and *Wedderburn* for the plaintiff.
Blackstone and *Coxe* for the defendant.

LORD MANSFIELD, C.J.—This is an extremely clear case, but it may be of B use to state the general principles upon which it will be determined. There are two questions: (i) whether the plaintiff is entitled to recover anything, and what, upon the first count upon the bill of exchange considered as a written security; (ii) whether upon either of the other counts, upon the justice and equity of the case.

As to the first, the general rule established ex comitate et jure gentium is that C the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom. HUBER says that (PRAELECTIONES, lib. 1, tit. 3, para. 43) contracts are to be considered according to the place wherein they are to be executed. As, therefore, the bill in the present case is made payable in Eng- D land, it is entirely an English transaction, and to be governed by the local law. This stands upon the same ground as that landed property must be governed by the local law, in consequence whereof, deeds and wills, made in Paris to convey land in England must be made and interpreted according to our law. It is clear that by the statute of Anne [Gaming Act, 1710] all bills of exchange upon a gaming consideration are void, and (by the way) the fact is not found whether, even in E France, you may not enter into and contemplate the consideration of a gaming note. I rather think you may. Here the payment is to be in England; it is an English security; and it is clear that in England the writing, as a writing, is void.

Counsel for the defendant has argued very rightly that Sir John Bland could never be called upon abroad for payment of this bill until there had been a wilful default of payment in England. The bill was drawn by Sir John Bland on himself, F in England, payable ten days after sight. In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England, and the local nature of the thing requires them to be carried into execution according to the law here.

G The case does not leave room for a question, for the law of both countries is the same. The consideration of the bill of exchange might, in an action upon it, be gone into there as well as here. As to the money won at play, it could not be recovered in any court of justice there, notwithstanding the bill of exchange. This writing is, as a security, void (being for a gaming debt) both in France and in England. We may, therefore, lay the bill of exchange out of the case: it is H very clear, the plaintiff cannot recover upon that count.

As to the other counts—for money had and received to the plaintiff's use and for money lent and advanced to him, I think there is a plain distinction between the money won and the money lent, laying the bill of exchange quite out of the case. No action can be maintained for money won at gaming. The statute law prohibits any recovery upon a gaming consideration, as the common law does I upon all other turpes causæ. There are many cases where the law of the country in which the contract is made shall prevail, and it is hard to lay down the nice rule of distinction. There are many cases wherein foreign sentences are final, as with regard to the validity of marriages, many where they are only a ground of evidence prima facie. Here I must remark obiter that it was hinted on the part of the plaintiff that the law of Scotland must determine the validity of the marriages of minors there celebrated. HUBER, p. 33, puts a parallel case, and determines expressly against it. I give no opinion; I only mention it to hinder bystanders from taking those arguments for granted. What makes an end of this

part of the case is that, as to money won, the money was won in France, and, therefore, its recovery ought to be governed by the law of France, and the law is the same in France and in England. As for the court of honour, it is no part of the law of the land; no court of justice will aid it; the parliament of Paris will take no cognizance of it. It is like the arbitrary jurisdictions set up here at horse-races and cockpits, or (as has been observed at the Bar) like the courts-martial in England which are to decide what is, or is not, behaving like a gentleman. If a cause really comes before them, well; if not, no court of law will adopt their rules of decision. But here the cause could not come before them; the bill was not payable, and it was no breach of honour not to pay it before it was due. I, therefore, lay this court out of the case, and, more especially, as this is a suit against representatives, not the party himself.

As to the money won, the contract is to be considered as void by the law of France, as well as by the law of England, which makes it unnecessary to consider how far the law of France ought to be regarded.

Next, as to the money lent. It has been twice judicially determined (*Slater* v. *Emerson* (1), coram EYRE, C.J., and *Barjeau* v. *Walmsley* (2), coram LEE, C.J.) that the legislature meant only to void the security, not the contract, in order to give courts an opportunity to examine into the merits of the consideration which, in this case, is stated to be extremely fair. Possibly it might be lent to pay foreigners' money won and thereby to extricate the deceased from the clutches of the court of honour. Here also then the law of France is the same as in England. The contract, when fair, is good in both countries, and the plaintiff must, therefore, recover under his counts for the general assumpsits.

The only question remaining is what interest he is entitled to receive. I find the general rule has been, upon all contracts carrying interest, to stop interest the day that the writ is sued out. This is certainly unreasonable, for the party can never have (by this rule) what he is entitled to, due interest. He can have no new action for the subsequent interest, nor any damages pendente brevi, as in the old actions at common law. In Chancery the rule established by LORD TALBOT in respect of tithes was that they should be paid down to the last act which the court has done to ascertain the sum. The Exchequer now pursues the same rule, having altered their old one upon my argument. I think in this case that the interest must be carried down to this time. It is but a trifle here, but I am glad of an opportunity to have this matter settled, and am desirous to consult the rest of the judges upon it that the practice of the courts may be uniform.

DENISON, J., gave no opinion on this last point. As to the rest, he said it was a plain, clear, short case. It was determinable by the rules of the common law, and no other law. He continued: The money is made payable in England. As it is a foreign bill of exchange, it must of course be dated abroad, but it is to be paid here at home. The plaintiff has appealed to the laws of England by bringing his action here, and the case must be determined by them.

By the laws of England, the security is void, which might have been pleaded as well as it might be given in evidence, and the defendant needed not, in his plea, to have said where it was won at play. Being a transitory action, it must then have been tried where the action was brought, and so it must have been if the plea had been local. Indeed, in many cases that might be put the determination must have been according to the laws of the place where the fact arose. But the present case is not so. Here the security is void by the laws of the country where he brings his action upon it. And this security is one entire security both for the money won at play, and the money lent at play.

There is a distinction between the contract, and the security. If part of the contract arises upon a good consideration, and part of it upon a bad one; it is divisible, but, it is otherwise as to the security. That, being entire is bad for the whole. Therefore, the plaintiff ought to be barred of this action upon this bill of exchange, as being a void security by the laws of this country where he brings

his action. But still the contract remains, and he has a right to maintain his action for so much of his demand as is legal, which is the money lent.

WILMOT, J.—I have no doubt as to the money lent. If there had been no authority in point, I should have thought that the sound ground of the Act [Gaming Act, 1710] was merely to examine the consideration, and not conclude the drawer by his own written act. In the case put at Bar of a man's lending money and winning it, then lending more and so on, I should think it a plain fraud on the Act. (N.B.—This is the very case in *Barjeau* v. *Walmsley* (2) before cited and relied upon). As to the interest, I incline to Lord Chief Justice's opinion. This is an action sounding in damages, and the damage is the detention of the plaintiff's debt. I think, upon memory, that the old statutes of costs talk of the costs of the writ, which SIR EDWARD COKE extends to subsequent costs to the end of the suit. There is the same reason for extending the interest. As to the money won, when considered minutely, there is no case, no point, no law. The general question, whether a contract good abroad and void at home can be enforced here in England, is a very important one. I am clear in my opinion upon it, but it does not come into this case, because herein the law of England and France is the same. I pay no regard to the court of honour, a whimsical, fantastical court which the law of England will not lend its powers to assist. Besides, Sir John never was the object of this jurisdiction, and his representatives never can be. The place where the money is to be paid must guide the law. A strong reason for the plaintiff's recovering in this action the money lent is that the bill of exchange is payable in England, and, therefore, it shall be determined according to the laws of England, where it is payable. As in *Champant* v. *Lord Ranelagh* (3), Mich. 1700, in Chancery (reported Prec. Ch. 128). A bond was made in England and sent over to Ireland, the money to be paid there, but it was not mentioned what interest should be paid. The Lord Keeper was of opinion that it should carry Irish interest. Therefore, as this money was payable in England, the law of England must be the rule of recovering it.

I give no positive opinion on the other point, supposing a bad contract by our law, but good abroad, is stipulated to be performed abroad. Yet I cannot help thinking that when a party applies to the courts of England, he must conform to the English law. I see no difference, whether the contract be void by the common or statute law. Both are established by the consent of the supreme legislative power, and numbers of contracts would be void by the common law which are good in foreign countries. For instance, in many parts abroad, a courtesan may maintain an action for the price of her prostitution. But, surely, that would never be maintainable here, though forbidden by no positive statute.

It was then objected on the part of the defendant that as the court had declared the whole bill of exchange void, as the statute declares it to be, utterly, to all intents and purposes whatsoever, it could not be taken notice of so as to make the £300 carry interest, which, upon the mere general assumpsit laid in the two last counts, it would never do. It was compared with indentures of apprenticeship, upon which the duty was not paid, which being declared void by the statute 8 Ann., c. 9, s. 39, no settlement can be gained in consequence of a service under them: *Curenden Parish* v. *Laland, Lancashire, Parish* (4). But the court said that the security only being void, the contract contained in that security (which carried interest) remained in full force. Afterwards, in the same term, the Chief Justice declared that it appeared from the case (independent of the bill of exchange) that the plaintiff had lent the intestate £300 bona fide, for which he took a void security, bearing interest ten days after date. This security is void by the statute, but we have before delivered our opinion that the contract remains and, therefore, interest is certainly due.

The next question is how far the interest should go. In the present case this is a very minute consideration, but I am glad of an opportunity of settling a point, the practice in respect to which is not founded in law, but upon a mistake. In

justice, undoubtedly, interest is due to the time when the debt is paid, for, when a man contracts to pay principal and interest, he ought to pay interest so long as he retains the principal. The court should, therefore, order the payment of interest up to the time when it orders execution to be taken out. It is said that damages are recovered and assessed by the jury, which will extend to this case. But we all know that in actions upon contracts for the payment of money, the damages are nominal; the true relief consists in the specific performance. When money is given as damages it is where the money is not itself the specific demand, but is used as a common measure to ascertain the amount of the injury. I have looked into and fully considered all the statutes upon the subject of damages. Not one has any reference to this matter. On the principles of common law, whenever a duty incurred (pending the writ) for which no other satisfaction could be had, damages were given to the time of the judgment. Thus, in account, the judgment is quod computet, which includes all items of account up to the time of computation. On a writ of annuity, after judgment, no new writ can be had for arrears. Judgment is, therefore, given for the whole that becomes due, pending the writ. Upon the Statute of Gloucester, which gives damages in a real action, Sir Edward Coke, 2 Co. Inst. 288, holds that they shall extend to damages, pendente brevi. But whenever a new writ could be brought, damages were not computed pendente brevi as in covenant, actions of trespass, or for other torts.

Upon the same reason, if a man brings an action on a contract carrying interest, and the action hangs three or four years, no new action will lie for the mere interest, and, therefore, he ought to be allowed it now. The Court of Chancery has, in these matters of interest, a concurrent jurisdiction with courts of law, exclusive of its extraordinary jurisdiction by way of relief. This arises from the frequent contemplation of interest in respect of assets, and the consideration of assets always gives the Court of Chancery a jurisdiction. It would be absurd that two concurrent jurisdictions should be different in their principles, on which ground it is that courts of equity have usually conformed to the practice of the ecclesiastical courts in respect of legacies. In Chancery they always compute down to the time of the last act done by the court to liquidate the demand. I do not see why the jury should not in their discretion (according to the circumstances of the case) compute down to the verdict, or rather, to the first four days of the ensuing term. The mistake before hinted at, in the present course of practice, arises from the officer's looking upon an action of assumpsit as merely an action of trespass, and as in common actions of trespass, damages are only recovered to the day of suing out the writ, therefore, they computed in the same manner here. Where an error is established and has taken root upon which any rule of property depends, it ought to be adhered to by the judges until the legislature thinks proper to alter it lest the new determination should have a retrospect and shake many questions already settled, but the reforming erroneous points of practice can have no such bad consequences, and, therefore, they may be altered at pleasure, when found to be absurd or inconvenient. Therefore, without computing to an exact nicety, let there be judgment for the plaintiff, for £300 principal, and £75 interest (viz., five years at 5 per cent., down to Sept. 10, 1760).

Order accordingly.

CARTER *v.* BOEHM

[Court of King's Bench (Lord Mansfield, C.J., and other judges), Easter Term, 1766]

[Reported 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162]

Insurance—Proposal—Duty of assured to disclose material facts—Failure to perform duty—Fraud—Avoidance of policy—Matters exempt from disclosure—Concealment by insurer.

Insurance is a contract upon speculation. The special facts on which the contingent chance is to be computed lie most commonly in the knowledge of the assured. The insurer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the insurer into a belief that the circumstance does not exist and to induce him to estimate the risk covered by the policy as if it did not exist. Keeping back such circumstance is a fraud, and, if it occurs, the policy is void, although the suppression should happen by mistake without any fraudulent intention. The policy would equally be avoided by concealment by the insurer, as if he insured a ship which he knew to be arrived, in which case the assured would be entitled to recover the premium. But an assured need not mention what the insurer knows or ought to know, nor what lessens the agreed risk, nor general topics of speculation, nor what the insurer waives being informed of. The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith.

Fraud—Rule of law designed to prevent—Construction—Not to protect or assist fraud.

Per Lord Mansfield, C.J.: What has often been said of the Statute of Frauds may with more propriety be applied to every rule of law drawn from principles of natural equity and designed to prevent fraud—that it should never be so turned, construed, or used as to protect or be a means of fraud.

Notes. As to the statutory provisions regarding disclosure in marine policies see s. 18 of the Marine Insurance Act, 1906 (13 Halsbury's Statutes (2nd Edn.) 14).

Applied: *Haywood* v. *Rodgers* (1804), 4 East, 590. Considered: *Campbell* v. *Rickards* (1833), 5 B. & Ad. 840. Approved: *Bates* v. *Hewitt* (1867), L.R. 2 Q.B. 595. Considered: *Harrower* v. *Hutchinson* (1870), L.R. 5 Q.B. 584; *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q.B. 782; *Yorke* v. *Yorkshire Insurance Co.*, [1918–19] All E.R.Rep. 877; *Locker and Woolf, Ltd.* v. *Western Australian Insurance Co.* (1935), 153 L.T. 334. Referred to: *Gibson* v. *Small* (1853), 4 H.L.Cas. 353; *Burgess* v. *Wickham* (1863), 3 B. & S. 669; *Gandy* v. *Adelaide Insurance Co.* (1871), L.R. 6 Q.B. 746; *Rowley* v. *London and North Western Rail. Co.*, [1861–73] All E.R.Rep. 823; *Re Robinson*, *Ex parte Burrell* (1876), 1 Ch.D. 539, n.; *Davenport* v. *Charsley* (1886), 54 L.T. 372; *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch.D. 616; *Gedge* v. *Royal Exchange Assurance Corpn.*, [1900–3] All E.R.Rep. 179; *Cantiere Meccanico Brindisino* v. *Janson* [1912] 3 K.B. 452; *Mann Macneal and Steeves* v. *Capital and Counties Insurance Co.*, *Mann Macneal and Steeves* v. *General Marine Underwriters*, [1921] 2 K.B. 300; *Greenhill* v. *Federal Insurance Co.* (1926), 95 L.J.K.B. 717; *Schoolman* v. *Hall*, [1951] 1 Lloyd's Rep. 139.

As to the avoidance of policies on the ground of fraud or non-disclosure, see 22 Halsbury's Laws (3rd Edn.) 110–121, 185–205. For cases see 29 Digest (Repl.) 63–67, 189 et seq., 378–382, 470–474, 536, 537.

Rule Nisi for the new trial of an action on a policy of insurance effected by the plaintiff, Roger Carter, on behalf of his brother, Governor George Carter, and underwritten by the defendant, Charles Boehm.

The action was tried before LORD MANSFIELD at Guildhall, in the city of London, and a verdict was found for the plaintiff by a special jury of merchants.

The action was on a policy of insurance for one year, viz., from Oct. 16, 1759, to Oct. 16, 1760, for the benefit of the governor of Fort Marlborough [i.e., Bencoolen], George Carter, against the loss of Fort Marlborough in the island of Sumatra in the East Indies, by its being taken by foreign enemy. The fort was taken in fact by the French within the year. The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the plaintiff to him and the use made of these instructions to show that the insurance was made "for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides have been long in Chancery and the evidence in that court on both sides was read at the trial. It was objected, on behalf of the defendant, that the plaintiff had been guilty of fraud, by concealment of circumstances which ought to have been disclosed, particularly the weakness of the fort and the probability of its being attacked by the French, which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother, the plaintiff; the second was from the governor to the East India Company. The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the governor had £20,000 in effects and only insured £10,000, and that he was guilty of no fault in defending the fort. The first of these depositions was by Captain Tryon, which proved that this was not a fort proper or designed to resist European enemies but was only calculated for defence against the natives of the island of Sumatra, and also that the governor's office was not military, but only mercantile, and that Fort Marlborough was only a subordinate factory to Fort St. George. There was no evidence to the contrary. And a verdict was found for the plaintiff, by the jury.

The defendant obtained a rule nisi for a new trial.

Dunning, for the plaintiff, showed cause against the rule.

Sir Fletcher Norton and *Eyre* (Recorder of London), for the defendant, supported the rule.

Cur. adv. vult.

LORD MANSFIELD, C.J., delivered the following judgment of the court: This is a motion for a new trial. In support of it the counsel for the defendant contend, that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwritten, amount to a concealment, which ought, in law, to avoid the policy. Counsel for the plaintiff insists that the not mentioning these particulars does not amount to a concealment which ought in law to avoid the policy, either as a fraud or, as varying the contract.

First, it may be proper to say something, in general, of concealments which avoid a policy; secondly, to state particularly the case now under consideration, and, thirdly, to examine whether the verdict, which finds this policy good although the particulars objected were not mentioned, is well founded.

First, insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Keeping back such circumstance is a fraud, and, therefore, the policy is void. Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement. The policy would equally be void, against the underwriter if he concealed, as if he insured a ship on her voyage which he privately knew to be arrived, and an action would lie to recover the premium.

The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; sed cum quod tuscias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire: CICERO, DE OFF., lib. 3, c. 12, 13. This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favour of the party misled by his ignorance of the thing concealed.

There are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows: Scientia utrinque par pares contrahentes facit. An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation. The underwriter is bound to know every cause which may occasion natural perils, as the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils from the ruptures of States from war and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace, from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, and so on. If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere, he needs not be told the secret enterprises they are destined upon, because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two, or if he insures a voyage, with liberty of deviation he needs not be told what tends to show there will be no deviation. Men argue differently from natural phenomena and political appearances. They have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both. Each professes to act from his own skill and sagacity, and, therefore, neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract which one privately knows, and the other is ignorant of and has no reason to suspect. The question, therefore, must always be whether there was, under all the circumstances at the time the policy was underwritten, a fair representation or a concealment, fraudulent if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run.

This brings me, in the second place, to state the case now under consideration. The policy is against the loss from Fort Marlborough, being destroyed by, taken by, or surrendered to, any European enemy, between Oct. 1, 1759, and Oct. 1, 1760. It was underwritten on May 9, 1760. The underwriter knew at the time that the policy was to indemnify Roger Carter, the governor of Fort Marlborough, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort Marlborough, Sept. 22, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendant then knew of a letter written to the East India Co., which the company offered to put into my hands, but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

An objection occurred to me at the trial whether a policy against the loss of Fort Marlborough, for the benefit of the governor, was good upon the principle which does not allow a sailor to insure his wages. But, considering that this

place, though called a fort, was really but a factory or settlement for trade, and A
that he, though called a governor, was really but a merchant, considering, too,
that the law allows the captain of a ship to insure goods which he has on board, or
his share in the ship if he be a part-owner, and the captain of a privateer, if he be a part-owner, to insure his share, considering, too, that
the objection did not lie upon any ground of justice in the mouth of the underwriter who knew him to be the governor at the time he took the premium, and B
as, with regard to principles of public convenience, the case so seldom happens
(I never saw one before) any danger from the example is little to be apprehended,
I did not think myself warranted, upon that point, to nonsuit the plaintiff,
especially, too, as the objection did not come from the Bar. Though this point was
mentioned, it was not insisted upon at the last trial, nor has it been seriously
argued upon this motion, as sufficient, alone to vacate the policy, and, if it had, C
we are all of opinion that we are not warranted to say it is void, upon this account.

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity, where they have had an opportunity to sift everything to the bottom, to get every discovery from the governor and his brother and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term. D

The plaintiff proved without contradiction that the place called Bencoolen or Fort Marlborough is a factory or settlement, but no military fort or fortress. It was not established for a place of arms or defence against the attacks of a European enemy, but merely for the purpose of trade and defence against the natives. The fort was only intended and built with an intent to keep off the country blacks. The only security against European ships of war consisted in the difficulty of the E
entrance and navigation of the river for want of proper pilots. The general state
and condition of the fort, and of the strength thereof, was in general well known
by most persons conversant or acquainted with Indian affairs or the state of the
company's factories or settlements, and could not be kept secret or concealed
from persons who should endeavour by proper inquiry to inform themselves.
There were no apprehensions or intelligence of any attack by the French until F
they attacked Natal in February, 1760. On Feb. 8 there was no suspicion of any
design by the French. The governor then bought from the witness goods to the
value of £1,000, and had goods to the value of above £20,000 and then dealt for
£50,000 and upwards. On April 1, 1760, the fort was attacked by a French
man-of-war of 64 guns and a frigate of twenty guns under Comte D'Estaigne,
brought in by Dutch pilots. The fort was taken and afterwards delivered to the G
Dutch, and the prisoners were sent to Batavia.

On the part of the defendant, after all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760, or that there was the least intelligence or alarm that they might make the attempt, until the taking of Natal in 1760. He did not offer to H
disprove the evidence that the governor had acted, as in full security, long after
the month of September, 1759, and had turned his money into goods as late as
Feb. 8, 1760. There was no attempt to show that he had not lost by the capture
very considerably beyond the value of the insurance. But the defendant relied
upon a letter, written by the governor to the East India Co., bearing date Sept. 16,
1759, which was sent to England by the Pitt, Captain Wilson, who arrived in I
May, 1760, together with the instructions for insuring, and also a letter bearing
date Sept. 22, 1759, sent to the plaintiff by the same conveyance, and at the same
time. The former of them notified to the East India Co. that the French had the
preceding year, a design on foot, to attempt taking the settlement by surprise,
and that it was very probable that they might revive that design. It confessed and
represented the weakness of the fort, its being badly supplied with stores, arms and
ammunition, and the impracticability of maintaining it (in its then state) against
a European enemy. The latter letter (to the governor's brother) owned that he was

A "now more afraid than formerly, that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention, last year."

Therefore, he desired his brother to get an insurance made upon his stock there. Reliance was also placed upon the cross-examination of the broker who negotiated B the policy and stated that, in his opinion, these letters ought to have been shown, or the contents disclosed, and, if they had, the policy would not have been underwritten.

The defendant's counsel contended at the trial as they have done upon this motion, that the policy was void (i) because the state and condition of the fort, mentioned in the governor's letter to the East India Co., was not disclosed; C (ii) because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle; (iii) that he had not disclosed his having received a letter of Feb. 4, 1759, from which it seemed that the French had a design to take this settlement by surprise the year before. They also contended that the opinion of the broker was almost decisive. The whole was laid before the jury, D who found for the plaintiff.

Thirdly, it remains to consider these objections, and to examine whether this verdict is well founded. To this purpose, it is necessary to consider the nature of the contract at the time it was entered into. The policy was signed in May, 1760. The contingency was

E "whether Fort Marlborough was or would be taken, by a European enemy, between October, 1759, and October, 1760."

The computation of the risk depended upon the chance whether any European power would attack the place by sea. If they did, it was incapable of resistance. The underwriter at London, in May, 1760, could judge much better of the probability of the contingency than Governor Carter could at Fort Marlborough, in Sep- F tember, 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, everything which was known at Fort Marlborough in September, 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the G insurance. He knew that ship must have brought many letters to the East India Co., and, particularly, from the governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by a European power. If there had been any design on foot, or any enterprise begun in September, 1759, to the H knowledge of the governor, it would have varied the risk understood by the underwriter, because, not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any design subsisting in September, 1759. There was no such design in fact. The attempt was made without premeditation from the sudden opportunity of a favourable occasion, by I the connivance and assistance of the Dutch, which tempted Comte d'Estaigne to break his parol.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealment. The first concealment is that he did not disclose the condition of the place. The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistent with his duty. He knew the governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question,

he underwrote. By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed in various ways. It was not a matter within the private knowledge of the governor only. But, not to rely upon that, the utmost which can be contended is that the underwriter trusted to the fort being in the condition in which it ought to be, in like manner as it is taken for granted that a ship insured is seaworthy. What is that condition? All the witnesses agree that it was only to resist the natives, and not a European force. The policy insures against a total loss, taking for granted that if the place was attacked it would be lost. The contingency, therefore, which the underwriter insured against is whether the place would be attacked by a European force, and not whether it would be able to resist such an attack if the ships could get up the river. It was particularly left to the jury to consider whether this was the contingency in the contemplation of the parties. They found that it was. We are all of opinion that in this respect their conclusion is agreeable to the evidence. In this view, the state and condition of the place was material only in case of a land attack by the natives.

The second concealment is his not having disclosed that, from the French not being able to relieve their friends upon the coast, they might make them a visit. This is no part of the fact of the case. It is a mere speculation of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it in this case depended upon the English naval force in those seas, which the underwriter could better judge of at London in May, 1760, than the governor could at Fort Marlborough in September, 1759.

The third concealment is that he did not disclose the letter from Mr. Winch of Feb. 4, 1759, mentioning the design of the French the year before. What that letter was, how he mentioned the design, or upon what authority he mentioned it, or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery, and nothing has come out as to this letter which he thinks makes for his purpose. The plaintiff offered to read the account Winch wrote to the East India Co., which was objected to and, therefore, not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the strongest light, it is a report of a design to surprise the year before, but then dropped. This is a topic of mere general speculation which made no part of the fact of the case upon which the insurance was to be made. It was said that, if a man insured a ship, knowing that two privateers were lying in her way and without mentioning that circumstance, it would be a fraud. I agree. But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance, because, it does not follow that they will cruise this year at the same time in the same place or that they are in a condition to do it. If the circumstance of this design laid aside had been mentioned, it would have tended rather to lessen the risk than increase it, for the design of a surprise which has transpired and been laid aside is less likely to be taken up again, especially by a vanquished enemy.

The jury considered the nature of the governor's silence as to these particulars. They thought it innocent, and that the omission to mention them did not vary the contract. We are all of opinion that in this respect they judged extremely right.

There is a silence, not objected to at the trial nor upon this motion, which might with as much reason have been objected to as the two last omissions, rather more. It appears by the governor's letter to the plaintiff, dated Sept. 22, 1759, that he was principally apprehensive of a Dutch war. He certainly had what he thought good grounds for his apprehension. Comte D'Estaigne being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. Probably, the loss of the place was owing to the Dutch. The French could not have got up the river without Dutch pilots, and it is plain that the whole was concerted with them. Yet, at the time of underwriting the policy, there was no intimation about the Dutch. The reason why

A counsel have not objected to the governor's not disclosing the grounds of this apprehension is because it must have arisen from political speculation and general intelligence. Therefore, they agree, it is not necessary to communicate such things to an underwriter.

Lastly, great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion which is not B evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and, therefore, it is improper and irrelevant in the mouth of a witness. There is no imputation upon the governor of any intention of fraud. By the same conveyance which brought his orders to insure he wrote to C the company everything which he knew or suspected. He desired nothing to be kept a secret, which he wrote either to them or his brother. His subsequent conduct, down to Feb. 8, 1760, showed that he thought the danger very improbable.

The reason of the rule against concealment is to prevent fraud and encourage good faith. If the defendant's objections were to prevail in the present case, the D rule would be turned into an instrument of fraud. The underwriter here, knowing the governor to be acquainted with the state of the place, knowing that he apprehended danger and must have some ground for his apprehension, being told nothing of either, signed this policy, without asking a question. If the objection that he was not told is sufficient to vacate it, he took the premium knowing the policy to be void in order to gain if the alternative turned out one E way, and to make no satisfaction if it turned out the other. He drew the governor into a false confidence that, if the worst should happen, he had provided against total ruin, knowing at the same time that the indemnity to which the governor trusted was void. There was not a word said to him of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection at the time, he ought not to have signed the policy F with a secret reserve in his own mind to make it void. If he dispensed with the information and did not think this silence an objection then, he cannot take it up now, after the event.

What has often been said of the Statute of Frauds may with more propriety be applied to every rule of law drawn from principles of natural equity and designed to prevent fraud—that it should never be so turned, construed, or used as to protect G or be a means of fraud. After the fullest deliberation we are all clear that the verdict is well founded and there ought not to be a new trial. Consequently, the rule for that purpose ought to be discharged.

Rule discharged.

A

HEARLE AND OTHERS *v.* GREENBANK AND OTHERS

[Lord Chancellor's Court (Lord Hardwicke, L.C.), May 30, 31, August 3, 1749]

[Reported 3 Atk. 695; 1 Ves. Sen. 293; 26 E.R. 1200]

Infant—Capacity—Exercise of power of appointment—Power over real estate—Interest of infant not concerned. B

An infant can exercise a power over real estate where his interest is not concerned, as where the power relates to property in which he has no interest.

Infant—Capacity—Presentation to benefice.

Per Lord Hardwicke, L.C.: It is said that an infant may present to a church because a presentation is not a thing of which he can make any profit, but C the strong ground the law goes on is that there can be no inconvenience because the bishop is to judge of the qualification of the clerk presented.

Notes. Considered: *Re Cardross's Settlement* (1878), 7 Ch.D. 728; *Re D'Angibou, Andrews* v. *Andrews*, [1874–80] All E.R.Rep. 1184; *Re Wernher, Wernher* v. *Beit*, [1918] 1 Ch. 339. Referred to: *Boughton* v. *Boughton* (1750), 2 Ves. Sen. 12; *Stike* v. *Dawson*, [1843–60] All E.R.Rep. 1076. D

As to exercise of powers by infants, see 21 Halsbury's Laws (3rd Edn.) 164, and as to presentation to a benefit by an infant, see ibid., vol. 13, pp. 257, 258. For cases see 19 Digest (Repl.) 400; 28 Digest (Repl.) 492–494.

Cases referred to:

(1) *Lord Buckhurst's Case* (1595), Moore, K.B. 488. E
(2) *Rich* v. *Beaumont* (1727), 6 Bro. Parl. Cas. 152.
(3) *Moore* v. *Hussey* (1609), Hob. 93.
(4) *Portington's Case* (1613), 10 Co. Rep. 35 b; 77 E.R. 976; sub nom. *Portington* v. *Rogers*, 2 Brownl. 65, 138; 38 Digest (Repl.) 851, *665*.
(5) *Needler* v. *Bishop of Winchester* (1614), Hob. 220; 80 E.R. 367; 11 Digest (Repl.) 645, *691*. F
(6) *Evelyn* v. *Evelyn* (1731), 2 P.Wms. 659; 2 Barn.K.B. 118; 24 E.R. 904; on appeal (1733), 6 Bro. Parl. Cas. 114, H.L.; 40 Digest (Repl.) 670, *1651*.
(7) *Lord Kilmurry* v. *Geery* (1713), 2 Salk. 538; 1 Eq. Cas. Abr. 341; 91 E.R. 456; 40 Digest (Repl.) 692, *1872*.
(8) *Noys* v. *Mordaunt* (1706), 2 Vern. 581; Prec. Ch. 265; 24 E.R. 128; sub nom. *Noyes* v. *Mordant*, Gilb. Ch. 2; 20 Digest (Repl.) 371, *932*.
(9) *Acherley* v. *Wheeler and Vernon* (1721), 1 P.Wms. 783. G
(10) *Jewson* v. *Moulson* (1742), 2 Atk. 417; 26 E.R. 652; sum nom. *Ineson* v. *Moulston*, *Vobe's Case*, 9 Mod. Rep. 373, L.C.; 5 Digest (Repl.) 701, *6126*.

Bill by the plaintiffs to establish the will of William Worth deceased.

William Winsmore, a tradesman in Worcester, in March, 1739, married Mary Worth, the only child and heir of Doctor William Worth, archdeacon of Worcester, H who was very rich, without the knowledge or consent of her father, Mr. Winsmore at that time being upwards of forty years of age and she not quite sixteen. The marriage was kept secret for many months, and when it was disclosed Doctor Worth was at first greatly enraged at it, but, Winsmore pretending that if the Doctor would let him have £1,400, part of £3,000, his wife's portion independent of her father, he would make a suitable settlement. Doctor Worth did accordingly pay I the sum to him, and apparently was reconciled to him, but Doctor Worth, discovering soon after a fraud intended on him by Winsmore and no settlement made, showed an utter aversion to him and would never be reconciled to him afterwards. Winsmore being in insolvent circumstances, a commission of bankruptcy issued against him on Mar. 3, 1740, and Johnson and others were chosen assignees. On June 2, 1741, his wife gave birth to a daughter, the defendant Mary Winsmore. Afterwards, Mr. Winsmore proving an unkind husband, his wife left him in December, 1741, under the influence and persuasion of her father who on those

terms became reconciled to her. In August, 1742, Doctor Worth died, but before his death he made his will, dated August 5, by which he devised

> "all his freehold, copyhold, and real estates, whatsoever and wheresoever, and all his leasehold estate to Wood and Greenbank, their heirs, executors, administrators and assigns, upon trust, that they should apply the rents, issues and profits thereof, to and for the sole and separate use of his daughter Mary, wife of William Winsmore, during her life, and at her disposal, and not to be subject to the debts, power or control of her said husband, but that her receipt, notwithstanding her coverture, should be effectual for the same, and upon further trust that they should permit and suffer his said daughter, by any deed or writing to be by her executed, in the presence of three or more credible witnesses (notwithstanding her coverture) to give, devise and bequeath all his said freehold, copyhold and leasehold estates, to such person and persons as his said daughter should think fit, she having a particular regard to his poor relations in Cornwall."

All the rest and residue of his goods, chattels, and personal estate, after payment of his debts, legacies and funeral expenses, he gave to Wood and Greenbank, in trust for his daughter, and for her separate use and disposal, and not subject to the debts, power or control of her husband. He appointed Wood and Greenbank executors of his will.

On Dec. 24, 1742, Mrs. Winsmore died at Reigate, Surrey, where she had lived since her leaving her husband, but before her death she, in pursuance of the power given to her by her father's will, did on Oct. 16, 1742, duly execute her power of appointment and disposition delegated to her over his whole real and personal estate by a writing signed and sealed in the presence of three witnesses, and in the form of her last will and testament, whereby she gave and bequeathed to her daughter Mary Winsmore £100 a year, until the age of ten years, and after, the further sum of £50 a year until she attained the age of twenty-one, the said sums to be applied by her executors for the education and maintenance of her said daughter according to their discretion. She also gave and devised to her said daughter £8,000 to be paid her when she attained the age of twenty-one years, but if her said daughter should die before that age without issue living at her death, then she bequeathed the said £8,000 to her cousins, Henry Worth and Francis Hearle, to be equally divided between them. After giving several other legacies, she charged all her real and personal estate which she was entitled to by virtue of her father's will with the payment thereof, and appointed joint executors, guardians and trustees to her daughter until twenty-one. All the rest, residue and remainder of her real and personal estate, to which she was entitled or interested in she gave and devised to the plaintiffs, their heirs, executors and administrators, for ever, as tenants in common, and not as joint-tenants.

The question was raised whether Mrs. Winsmore, under the sanction and authority given her by her father's will, could dispose of the real estate, as she had done by her will, notwithstanding her infancy.

Sir Dudley Ryder, *Evans*, *Hussey*, and *Noel* for the plaintiffs.
Wilbraham for assignees under Winsmore's bankruptcy.
Capper for creditors of Winsmore.
William Murray for Mary, daughter of Mrs. Winsmore.

Cur. adv. vult.

Aug. 3, 1749. **LORD HARDWICKE, L.C.**—Mrs. Winsmore had four kinds of estates. First, a leasehold estate settled on the marriage of her father and mother by a deed of Dec. 3, 1642, made after marriage, but pursuant to an agreement before, for the term of ninety-nine years. The term expired and was renewed on a lease for three lives, and so stood at Doctor Worth's death. This being a freehold lease came to Mrs. Winsmore, and the daughter was entitled as a special occupant, being a freehold lease descendible, and consequently the husband could have no

right, nor his assignees as standing in his place. I mention this to lay it out of the case. The next kind is personal estate that moved from Dorothy Price, the aunt of Mrs. Winsmore. On Aug. 24, 1761, she made her will and thereby devised several copyholds, which are chattels, and leaseholds, together with the residue of her real and personal estate, to her niece Mary, the daughter of Doctor William Worth. Under this will Mrs. Winsmore was entitled to about £3,000. There is no doubt but this part has survived to the husband, and the assignees under the commission of bankruptcy, as standing in his place, are entitled and not affected by the power in Doctor Worth's will. On that a question has been made on behalf of the infant daughter, the consideration of which I shall at present postpone. The next kind is the personal estate of Doctor Worth, the residue of which is to be for the separate use of Mrs. Winsmore, and to be at her disposal. The rule is, where a perpetual estate is given to the separate use of a feme covert, she is considered as a feme sole, and may dispose of it, and all that accrues upon it stands clear of any objection because she was above the age of seventeen, for several of the books go so far as to say that an infant above fifteen may give personal estate by will [see now s. 7 of Wills Act, 1837]. The next kind is the real estate of the father. Here the question is whether Mrs. Winsmore's will is an execution of the power given her under the will of the father.

I shall divide into three questions: (i) whether the power has been well executed; (ii) whether the plaintiffs in the original cause, who claim the residue of the real estate under the will of Mrs. Winsmore, are entitled in equity; (iii) whether the defendant William Winsmore, the bankrupt, is entitled to be tenant by the curtesy of his wife's estate, there being a child of the marriage.

The first is a very considerable question, and has never been determined. There is no precedent, either in a court of law or equity, where it has been held that a power over real estate executed by an infant is good, and, as I can find no precedent for it, I will make none.

As to the general question concerning powers in the large sense of the word, there are several kinds of powers infants may execute. As where an infant is a mere instrument or conduit pipe, and his interest not concerned.

Sir Edward Coke, in Co. Litt., p. 52, s. 66, says that delivering seisin is a mere ministerial act, and requires no judgment or discretion, but though the latter words are expressed generally, the law anciently was not so; and in Co. Litt., 128 a, Sir Edward Coke himself cites a passage out of the Mirror of Justices, in which it is expressly said that an infant cannot be an attorney. As in the sense of an attorney in a court of justice he cannot be, but when we speak of an infant's being an attorney, it is a good deal different from these kind of powers. Before the Statute of Uses, the power was over the use, therefore, all things necessary to be done over legal estates were done by way of conditions, and this was the method of exercising an authority over the legal estates. At law an infant might perform a condition where it was for his benefit.

As to other kind of powers by an infant, I find no sort of authority. It is said an infant may present to a church. What is the reason? Because a presentation is not a thing of profit of which the guardian can make any benefit, but the strong ground the law goes on is that there can be no inconvenience because the bishop is to judge of the qualification of the clerk presented. It has been said an infant may declare the use of a fine or common recovery, where he suffers it without a privy seal, and the use is good, and the fine and recovery shall stand. Why does the law allow it? Because, for want of a remedy, for as the matter of record stands, the law supposes he was of full age, and will not presume a judge or commissioners would take the fine upon any other terms, and the deed to lead the uses being part of the fine, shall likewise stand, and, therefore, all this arises from a want of remedy. It is said an infant may, by the custom of Kent, and of several manors, alienate his estate, and if he may do it by custom, why not by a power? Now a custom is lex loci, and is presumed in law to have a reasonable commencement, just the same as if a private Act of Parliament was made to give an infant

such a power, and, a custom being lex loci, it stands as strong upon this as if an Act of Parliament had been made for that purpose.

The case in MOORE, K.B. 512, has a resemblance to a power, but it is only put by SIR FRANCIS MOORE's arguendo, at the Bar [in *Lord Buckhurst's Case* (1)], and no authority is cited to support it. In BROOKE's ABR., 230, and ROLL. ABR., 611, it is laid down, that if after the statute of 32 Hen. 8 [c. 1; Wills Act, 1540: repealed by Wills Act 1837] a man seised of land enfeoffs A. and B. of this, to the use and intent to perform his will, and then by his will reciting the said feoffment, and feoffees to stand seised to the said use, declares his will to be that the said feoffees and their heirs stand seised of this to the use of J.S. and the heirs of his body, this is a good devise of the land by the intention of the devisor, though by no possibility the feoffees can stand seised to the said use. This case differs very little from the case put by SIR FRANCIS MOORE, which shows the land may be devised by custom, but not the use, and, therefore, I take this case not to be law.

Counsel for the plaintiffs have gone further, and insisted that a feme covert may exercise such a power, and cited *Rich* v. *Beaumont* (2) in the House of Lords. It was so determined in the case of Lady Travel, before LORD KING, L.C. So in the common case, where a power is given to a woman tenant for life, to execute leases, and, if so, it was argued, why not to an infant of the age of discretion? It has been said, too, that the disability of a feme covert is not more favoured in law than the disability of an infant or is rather a stronger disability. In a marginal note in *Moore* v. *Hussey* (3), in Hob. 95, which note is allowed to be his own, is this observation:

> "Coverture was not at common law so far protected as was infancy; and some other disabilities, scilicet, non sanæ memoriæ, ouster le mere and imprisonment, though a woman covert hath no less judgment than discovert."

But her disability does not arise from want of reason, and it is upon this ground that the separate examination of a femme covert on a fine is good, because when delivered from her husband her judgment is free.

An infant's disability is altogether from want of capacity. Co. LITT., 246 a:

> "The dying seised of a disseisor shall take away the entry of the wife after the death of her husband, as well for that she herself when sole might have entered and re-continued the possession; as also it shall be accounted her folly, that she would take such a husband which could not enter before the descent."

But if the woman were within age at the time of her taking husband, then the dying seised shall not after the decease of her husband take away her entry, because no folly can be accounted in her, for that she was within age when she took husband, and after coverture she cannot enter without her husband: Co. LITT., 246 b.

So in 10 Co. REP. at p. 43 a., *Portington's Case* (4):

> "The usage [said SIR EDWARD COKE] has always been upon a common recovery against husband and wife, to examine the wife, and to grant a dedimus potestatem to take her acknowledgment upon examination, as in the case of a fine. But a common recovery against an infant, although he appears by guardian, shall not bind the infant; for the infant has not such a disposing power of the land as the husband and wife have, but is utterly disabled by law to convey or transfer his inheritance or freehold to others during his minority."

So that in law there is a total absolute disability in an infant, that by no manner of conveyance can he dispose of his inheritance.

It has been argued here that there is no sort of inconvenience, for Mrs. Winsmore, being above the age of nineteen, was as discreet as if she had attained the age of twenty-one, and the court may judge whether she had discretion enough to execute such a power. This is of such latitude and extent that I own I should be very sorry, as presiding in a court of justice, to be entrusted with, for it does not come in question until after the death of the infant, and no personal inquiry

or examination can then be had of her judgment and discretion. For this I shall refer to Hob. 225 [*Needler* v. *Bishop of Winchester* (5)] :

> "In pleading, an age certain must be set down, and not left upon telling twelve pence, or measuring a yard of cloth, as some books are, that the court may judge it an age of discretion, for custom must not abrogate the law of nature."

The law will not admit it in the case of a custom, then why should it in the execution of a power?

This is the general reason that determines my opinion. And if the law had been otherwise, it must have happened in abundance of instances, for powers are given to infants to raise money, to make leases, etc. Infants come in the course of succession into possession, and yet it has never been held he could exercise any such power over real estate, and the applying for several private Acts of Parliament show the sense of mankind in this respect. Such an application was made in the case of the present Sir Thomas Parkins. In *Evelyn* v. *Evelyn* (5) (2 P.Wms. at p. 671) the case of *Lord Kilmurry* v. *Geery* (7), is more fully stated than in any other place. By the settlement a power was reserved of charging divers of the lands at any time during his life with £3,000. A person borrowed this sum of the doctor [Geery], and having executed his power while an infant, died soon after he came of age. The plaintiff, his son, brought his bill to redeem, on payment of the principal sum borrowed, but the court decreed it on the common terms, because here was a power given him by Act of Parliament to raise the money, and immediately to give security, which was actually done. I sent for the Register Book of this case, Easter Term, 1712, and there it looks as if it was a general power executed by virtue of a private Act of Parliament. I then sent for the record of the Act of Parliament, and there is an express clause to make all acts relating to the settlement, or in pursuance of any power therein, good, and that notwithstanding his minority, they shall be as valid as if he had attained the age of twenty-one. Therefore, when Lord Kilmurry made a settlement with such reservation, with the approbation of his trustees, the Act of Parliament operated upon it. Taking it, therefore, in general, I am of opinion that an infant cannot execute such a power.

The next consideration is, if there is anything particular in this power. First, as to the penning of the power:

> "That they should permit and suffer his daughter by any deed or writing, etc. (notwithstanding her coverture) to give, etc., all his freehold, etc."

What had the father in view? Why, to exclude the disability of coverture, and this was all he intended to guard against. If he likewise intended to exclude the disability of infancy, he would have taken care equally to express it. The daughter at the time of his death was upwards of nineteen years of age, and though he might think it right to give her this power during coverture, yet not so during her infancy. It is plain his view was to prevent the husband's influence, and to make all safe during her infancy. Therefore, from the penning of this power, a strong objection arises against her executing it during infancy, for expressio unius est exclusio alterius. The construction of law on such a power as the present, which is coupled with an interest, is very different from a naked power over another person's estate, and that distinction has been taken in the cases of feme coverts. The whole legal estate here is given to trustees.

First, as to the rents and profits, to the use of Mrs. Winsmore for life and, in the second place, to permit and suffer Mrs. Winsmore to give and dispose of the lands, etc., by deed or will, etc. So that she had an equitable interest in the lands, etc., and the equitable reversion in fee descended upon her. If she does not dispose of it, where will it vest? In herself. If not disposed of by her in her lifetime, where will it descend? To her daughter. If this, then, is a power to be exercised over her own inheritance, I am of opinion that it is such a power as an infant

A cannot exercise. But suppose the execution of the power is bad, yet it is said the plaintiffs have an equity to compel the infant to let them take the real estate, for she shall not take both by the will and against the will. In general this rule is right, and founded on proper premises but a wrong conclusion. For this purpose see *Noys* v. *Mordaunt* (8), in 2 Vern. 581.

I am of opinion that the infant in the present case is not to be compelled to B make her election. For the instrument here being void as to the real estate, there is no instance where an infant has in such a case been compelled to make an election, for here is properly no will at all as to the lands. It is like the case where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir-at-law and the personal estate to the heir-at-law. This is a good will as to personal estate, yet for want of being executed according to the C Statute of Frauds [s. 5, which required a devise of land to be attested by at least three witnesses: repealed by Wills Act, 1837], is bad as to the real estate. I should in that case be of opinion that the devisee of the real estate could not compel the heir-at-law to make good the devise of the real estate before he could entitle himself to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute. The distinction D between this case and that of *Noys* v. *Mordaunt* (8) is that there a father had disposed of his whole estate for the benefit of his children, and here Mrs. Winsmore is giving her whole real estate from her child. Therefore, she does not fall within that benevolent equity the court exercised in that case. But what I principally rely on is that here is no instrument which would pass the real estate.

The next question is whether the assignees in bankruptcy, as standing in the E place of Mr. Winsmore, the bankrupt, have a right to the rents and profits of Mrs. Winsmore's real estate, as considering him in the light of a tenant by the curtesy. I am of opinion that Mr. Winsmore could not be considered as tenant by the curtesy. Under Doctor Worth's will, the rents and profits are to be applied to the sole and separate use of Mrs. Winsmore, and the trustees who had the fee in all the testator's real estate, were to permit and suffer her to dispose, etc. F What was the effect of this? The whole legal estate of the inheritance was in the trustees. However, it is said that a husband may be tenant by the curtesy of a trust. But consider what is necessary to make a tenant by the curtesy. The wife must have the inheritance, and there must be likewise a seisin in deed in the wife during coverture. It is true, she had the inheritance, because it descended till the execution of the power, but then the father, whose estate it was, G has made the daughter a feme sole, and has given the profits to her separate use. Therefore, what seisin could the husband have during the coverture. He could neither come at the possession, nor the profits. Was there then any equitable seisin of the husband? None at all. To admit there was would be directly contrary to the father's intention, and, therefore, neither in law or equity was the husband tenant by the curtesy.

H Another question has been made, with regard to the interest of the £8,000 given by the will of Mrs. Winsmore to her daughter. I am of opinion, under the circumstances of this case, she is not entitled to the interest. The general rule is that where legacies are given payable at a certain time they carry no interest, for interest is for delay of payment, and consequently till the day of payment comes no interest is demandable. But I do admit at the same time, where a I legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the court allows interest. But in all these cases the ground the court goes on, is giving interest by way of maintenance. Here Mrs. Winsmore has allotted maintenance for her daughter from the general fund of her personal estate. There is another thing observable, the contingency in her will of the daughter's dying before twenty-one. I agree it is a condition subsequent, but still it shows the view of the testatrix, and that she saw it might never be her daughter's, and, therefore, to give her interest would be contrary to the intention of the testatrix. There are several cases where this court has made a great stretch

to give children interest on legacies, particularly *Acherley* v. *Wheeler and Vernon* (9), but that went on particular circumstances. Therefore, I am of opinion she can have no more interest than the maintenance in the meantime.

As to the estate left by Mrs. Dorothy Price, the aunt of Mrs. Winsmore, that must belong to the assignees of Mr. Winsmore under the commission of bankruptcy against him, as standing in the place of the husband. But then it is argued that, as Mr. Winsmore had made no provision for his wife or the issue of the marriage, his assignees should not be permitted to touch this, till they have made some provision for the issue of the marriage. So it was held in two cases before Lord Cowper, L.C., and I was also clearly of the same opinion in *Jewson* v. *Moulson* (10) (2 Atk. 417). But I can find no case where the court have done it in the case of assignees of a bankrupt after the death of the bankrupt's wife, and here too the issue of the marriage is so well provided for that I am of opinion the court ought not to make this the first precedent of it, whatever they might do in a case not so circumstanced. The present is not such a case as would incline the court to make a stride further than any of the former cases have gone.

His Lordship declared that as to the real estate devised by the will of Doctor Worth to his trustees, the will of Mrs. Winsmore, being made during her infancy, was not a good execution of the power relating thereto contained in Doctor Worth's will, and that the inheritance of such real estate was descended to the defendant Mary Winsmore, the infant, who was heir-at-law both of Mrs. Winsmore, her mother, and of Doctor Worth, and that the defendant William Winsmore, the bankrupt, was not entitled to be tenant by the curtesy thereof. He also declared that the leasehold estate comprised in the settlement made on the marriage of Doctor Worth with Mary Price, dated Dec. 3, 1722, which was now held by lease for lives, belonged to Mrs. Winsmore by virtue of the settlement, and on her death came to the infant her daughter and heir, and, therefore, directed both bills, so far as they sought any relief touching the said leasehold estate or the real estate of Doctor Worth, to be dismissed without costs. He also declared that the residue of Doctor Worth's personal estate, being given by his will in trust for the separate use of Mrs. Winsmore, was not subject to the debts, power or control of her husband, and also the rents and profits of Doctor Worth's real estate devised to her separate use accrued during her life, and the profits and proceeds of both these funds ought to be considered as the separate personal estate of Mrs. Winsmore, not subject to the debts or power of her husband; and that the same were well disposed of by Mrs. Winsmore, she being above the age of seventeen at the time of making her will. Therefore, he directed the cross-bill brought by the assignees under the commission of bankruptcy against Mr. Winsmore, so far as it sought any relief touching the personal estate of Doctor Worth, or the rents and profits of his real estate, to be dismissed without costs. He also declared that the legacy of £8,000 given by Mrs. Winsmore's will to her daughter, subject to the contingencies therein mentioned, would not carry interest till the same became payable according to the will, and that the annual sums thereby respectively given for her maintenance ought to be deemed as given in lieu of interest.

A

DALE *v.* HALL

[COURT OF KING'S BENCH (Lee, C.J., Wright, Denison and Foster, JJ.), Michaelmas Term, 1750]

[Reported 1 Wils. 281; 95 E.R. 619]

B *Carriage of Goods—Common carrier—Damage to goods—Shipowner—Liability—Absolute risk—Exception of act of God or King's enemies—Rats gnawing through keel of ship—Not within exceptions.*

A hoyman who undertakes to carry goods must deliver them safe at all events, except damaged by the act of God, or by the King's enemies.

C **Notes.** The immunities for the carrier and the ship are provided for by the Carriage of Goods by Sea Act, 1924, s. 1, Sched. Art. 4, r. 2 (23 HALSBURY'S STATUTES (2nd Edn.) 890).

Followed: *Laveroni* v. *Drury* (1852), 8 Exch. 166. Considered: *Pandorf* v. *Hamilton* (1886), 17 Q.B.D. 670 (see [1886–90] All E.R.Rep. 220, H.L.). Referred to: *Buddle* v. *Wilson* (1795), 6 Term Rep. 369; *Ansell* v. *Waterhouse* (1817), 6 D M. & S. 385; *Phillips* v. *Clark* (1857), 2 C.B.N.S. 156; *Hutchinson* v. *Guion* (1858), 5 C.B.N.S. 149; *Readhead* v. *Midland Rail. Co.* (1867), L.R. 2 Q.B. 412 (see [1861–73] All E.R.Rep. 30, Ex. Ch.); *Liver Alkali Works* v. *Johnson* (1874), 31 L.T. 95; *Nugent* v. *Smith* (1876), 1 C.P.D. 423.

As to common carrier's liability as insurer, see 4 HALSBURY'S LAWS (3rd Edn.) 141 et seq. As to examples of acts of God, see 8 HALSBURY'S LAWS (3rd Edn.) E 183. As to shipowner's liability as common carrier, see 35 HALSBURY'S LAWS (3rd Edn.) 286 et seq.; and for cases see 8 DIGEST (Repl.) 17 et seq.

Motion by the plaintiff for a new trial, on the ground that the defendant's evidence was not admissible, in an action on the case against a shipmaster or keelman who carried goods for hire from port to port. The plaintiff did not declare against him as a common carrier upon the custom of the realm, but the declaration F was that the defendant, at the special instance of the plaintiff, undertook to carry certain goods consisting of knives and other hardware safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money. The goods were delivered to the defendant on board his keel, and were kept so negligently by him that they were spoiled, to the plaintiff's damage. On the general issue non assumpsit.

G At the trial before BURNETT, J., the plaintiff proved the goods were all in good order and clean when they were delivered on board, and that they were damaged by water and rusted to the amount of £24. The defendant contended that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence that he had taken all possible care of the goods, that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the H water coming in, and that they pumped and did all they could to prevent the goods being damaged. The judge permitted this evidence to be given, and thereupon left it to the jury, who found a verdict for the defendant.

Clayton and *Ford* for the plaintiff.

Sir Thomas Bootle and *Serjeant Bootle* for the defendant.

I **LEE, C.J.**—This is a nice distinction, indeed. I am of opinion that the evidence given for the defendant was not admissible. The declaration is that the defendant undertook for hire to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence. This is no more than what the law says, everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God, or the King's enemies; and a promise to carry safely is a promise to keep safely.

WRIGHT, J.—I am of the same opinion.

DENISON, J.—The law is very clear in this case for the plaintiff. The declaration upon the custom of the realm is the same in effect with the present declaration. In the old forms it is that the defendant suscepit, etc., which shows that it is ex contractu. In the present case the promise to carry safely need not be proved, the law raises it; the breach is very right that he did not deliver them safely, but so negligently kept them that they were spoiled.

FOSTER, J.—I am of the same opinion.

New trial granted.

BARLOW *v.* GRANT

[Lord Keeper (Lord Guilford), October 27, 1684]

[Reported 1 Vern. 255; 23 E.R. 451]

Trust—Infant—Maintenance—Legacy—Expenditure of money out of legacy for maintenance and education.

Money expended for the maintenance and education of an infant is to be allowed out of a small legacy given to him, although it breaks into the principal, but where the legacy is considerable it might be reasonable to restrain the maintenance to the interest of the money.

Notes. Applied: *Barton* v. *Cooke* (1800), 5 Ves. 461. Distinguished: *Hamley* v. *Gilbert* (1821), Jac. 354. Considered: *Cooper* v. *Mantell* (1856), 27 L.T.O.S. 130. Referred to: *Lonsdale* v. *Berchtoldt* (1857), 3 K. & J. 185; *Re Sanderson's Trust* (1857), 3 K. & J. 497; *Borton* v. *Dunbar* (1860), 2 De G.F. & J. 338; *Presant* v. *Goodwin* (1860), 1 Sw. & Tr. 544.

As to gifts by will for particular purposes, see 39 Halsbury's Laws (3rd Edn.) 1083; for cases see 49 Digest (Repl.) 889 et seq. As to maintenance out of an infant's property, see 21 Halsbury's Laws (3rd Edn.) 168 et seq.; and for cases see 28 Digest (Repl.) 568 et seq.

Bill for £100 legacy given to a child. The defendant claimed to be allowed £16 a year for keeping the legatee at school. It was objected that only the bare interest of the money ought to have been expended on his education, and that the defendant ought not to have sunk the principal as he had done.

LORD GUILDFORD, Lord Keeper, thought it fit and reasonable to be allowed, and said that the money laid out in the child's education was most advantageous and beneficial for the infant and that, therefore, he should make no scruple of breaking into the principal where so small a sum was devised that the interest thereof would not suffice to give the legatee a competent maintenance and education, but in case of a legacy of £1,000 or the like, there it might be reasonable to restrain the maintenance to the interest of the money.

In this case, he said, there being £30 also given to the infant to bind him an apprentice, the infant died before he attained a competent age to be placed out an apprentice, and the question is whether this £30 should go to the executor of the infant. I think that this £30 ought to go to the executor or administrator of the infant.

The infant being seventeen years old and having made a will and named an executor, it was allowed to be a good disposition of the £30.

A

PARKER *v.* KETT

[Court of King's Bench (Sir John Holt, C.J., and other judges), Easter Term, 1701]

[Reported 1 Salk. 95; Holt, K.B. 221; 1 Ld. Raym. 658; 12 Mod. Rep. 467; 1 Com. 84; 91 E.R. 88]

Agent—Delegation of obligations to third persons—Deputy of steward of manor.

A deputy of the steward of a manor **held** to have power to do any act which his principal might have done except make a deputy, and he could not be appointed with less power.

Sheriff—Under-sheriff—Duty to act in name of sheriff—Extent of powers—Right to appoint deputy.

An under-sheriff is the deputy of the high sheriff in whose name he must act, and his power cannot be restrained to be less than that of the high sheriff, save only that he cannot make a deputy because that implies an assignment of his whole power, which he cannot assign over.

Notes. Considered: *Mountford* v. *Gibson* (1804), 4 East, 441. Referred to: *R.* v. *Lisle* (1738), Andr. 163; *R.* v. *Bedford Level Corpn.* (1805), 6 East, 356; *Woolley* v. *Clark*, [1814–23] All E.R.Rep. 584; *Doe d. Hornby* v. *Glenn* (1834), 3 Nev. & M.K.B. 837; *Thompson* v. *Harding* (1853), 2 E. & B. 630; *Bridges* v. *Garrett* (1869), L.R. 4 C.P. 580; *Ellis* v. *Ellis* (1905), 53 W.R. 617.

As to implied authority to delegate, see 1 Halsbury's Laws (3rd Edn.) 170 et seq.; and for cases see 1 Digest (Repl.) 445 et seq. As to under-sheriffs, deputies, bailiffs and officers, see 34 Halsbury's Laws (3rd Edn.) 669 et seq.; and for cases see 41 Digest (Repl.) 79 et seq.

Cases referred to:

(1) *Clere's Case* (1600), 6 Co. Rep. 17 b; Jenk. 260; 77 E.R. 279; sub nom. *Cleer* v. *Parker*, Cro. Eliz. 877; sub nom. *Parker* v. *Clere*, Moore, K.B. 567; sub nom. *Clere* v. *Parker*, Cro. Jac. 31; 37 Digest (Repl.) 324, *713*.

(2) *Combe's Case* (1613), 9 Co. Rep. 75a; 77 E.R. 843; 1 Digest (Repl.) 317, *41*.

(3) *Knowles* v. *Luce* (1580), Moore, K.B. 109; 72 E.R. 473; 1 Digest (Repl.) 446, *985*.

(4) *Lord Dacres' Case* (1584), 1 Leon. 288; 74 E.R. 263; 1 Digest (Repl.) 445, *978*.

(5) O'*Brian* v. *Knivan* (1619), Cro. Jac. 552; sub nom. *Sobream and Teige* v. *Kevan*, 2 Roll. Rep. 101, 130; 81 E.R. 686, 705.

(6) *Hutchins* v. *Glover* (1618), Cro. Jac. 463; 79 E.R. 396; sub nom. *Hitcham and Glover's Case*, 2 Roll. Rep. 6; 19 Digest (Repl.) 427, *2409*.

Action of Ejectment brought for lands in Tresingham in Norfolk on the demise of the defendant Charles Kett, tried by Sir John Holt, C.J., who reserved a point of law which arose on the evidence for his consideration and afterwards ordered that it should be argued in the King's Bench to have the opinion of all the judges.

Charles Kett, being seised in fee of a copyhold, demised it to his wife for life, remainder to Charles his son in tail, and, if he died without issue under age, remainder to Elizabeth his wife in fee. Mr. Keck, the Master in Chancery, was steward of this manor by patent, ad exercendum per se vel deputatem. Mr. Keck appointed one Clerk to be his deputy who acted as such for many years, and was sent for by Charles Kett to take a surrender of the lands. Clerk did not go himself but, by a writing under his hand and seal, appointed A. and B. to be his deputies jointly and severally only to take this surrender, which was done by A. accordingly, and afterwards presented, and Elizabeth Kett the defendant, admitted thereupon by Clerk.

Williams and *Weld* for the plaintiff.
Broderick and *Northey* for the defendant.

SIR JOHN HOLT, C.J., delivered the following opinion of the court: First, Clerk, who was Mr. Keck's deputy (and so it is of any other deputy where a deputy may be appointed), had full power to do any act or thing which his principal might have done. That is so essentially incident to a deputy that a man cannot be a deputy to do any single act or thing, nor can a deputy have less power than his principal. If his principal makes him covenant that he will not do any particular thing which the principal may do, the covenant is void and repugnant, as if the under-sheriff covenants that he will not execute any process for more than £20 without special warrant from the high-sheriff. This is void, because the under-sheriff is his deputy and the power of the deputy cannot be restrained to be less than that of his principal, save only that he cannot make a deputy because it implies an assignment of his whole power, which he cannot assign over. That by consequence A. was as well authorised by Clerk's writing, given him under hand and seal, as if Mr. Keck himself had given it; of which there could be no question it being to do a particular act.

Secondly, although A. acted in his own name without reciting his power or any relation to it, yet this taking of a surrender must be good; for he must be considered either as an attorney or under-deputy. Suppose the first, the law is plain, that where a man does such an act as he cannot do, so as to be effectual any otherwise than by virtue of his authority, that shall be taken to be in execution of his authority. But where a man has an interest and authority and does an act without reciting his authority, it shall be taken to be done by virtue of his interest: *Clere's Case* (1), 6 Co. Rep. 17 b. And although an under-sheriff must act in the name of the high sheriff because the writs are directed to the high sheriff and for other particular reasons, yet any other deputy may act either in his own name or the name of his principal. So is the judgment of *Combe's Case* (2), although in arguing it is said otherwise; and so it is of an attorney, but it is more regular to act in the name of the principal. Lastly, supposing him to be an under-deputy as if he had not been constituted to do a particular thing, but to be Clerk's deputy, this would have been void and he would have no real authority; yet even that constitution would have given him the colour and reputation of an authority to act as a steward de facto. And what he does as such is sufficient among the tenants for they have no power to examine his authority, nor is he to render them any account of it. *Knowles* v. *Luce* (3), *Lord Dacres' Case* (4), *O'Brien* v. *Knivan* (5), and Roll. Rep. 7, 101, 130 [*Hitcham and Glover's Case* (6); *Sobrean* v. *Kevan* (5)], are stronger cases. And so it is of an executor de facto, i.e., a tort executor.

Authorities by letter of attorney are either general or special. Thus, a letter of attorney may be to sue in omnibus causis motis et movendis or to defend a particular suit. Sir Philip Sidney, when he went to travel, gave a letter of attorney to Sir Thomas Walsingham to act and sell all his lands and all his goods and chattels; and this was held good. Where the authority is particular, the party must pursue it. If the act varies from it, he departs from his authority and what he does is void; but that must be intended of a variance not in circumstance, but of a variance material and substantial, as where the person, the thing, the estate or the date is mistaken, as if a warrant of attorney be to Hugh Barker, and the execution is pleaded to be by Hugh Barker.

ALTHAM'S CASE

[Court of Common Pleas (Sir Edward Coke, C.J., and other judges), Michaelmas Term, 1610]

[Reported 8 Co. Rep. 150 b; 1 Brownl. 62; 77 E.R. 701]

Action—Release—Extent—Release of "all actions, real and personal, suits, quarrels, and demands".

Regarding a release of "all actions, real and personal, suits, quarrels, and demands,"

Held: the word "quarrels" extended to actions, real and personal, causes of actions, and disputes; by a release of "all actions" actions depending and causes of actions were released; by a release of all suits executions were barred.

Document—Construction—Deed—Qualification of general words by special words.

Per Sir Edward Coke, C.J.: Where a deed contains special words followed by general words, both sets of words, as well general and special, shall stand. Subsequent words may qualify and abridge, but not destroy the generality of preceding words.

Document—Construction—Deed—Ambiguity—Extrinsic evidence to resolve.

Per Sir Edward Coke, C.J.: Extrinsic evidence is admissible to resolve a latent ambiguity in a deed, but not a patent ambiguity.

Notes. Considered: *Brice* v. *Smith* (1737), Willes, 1. Referred to: *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Witton* v. *Bye* (1618), Cro. Jac. 486; *Trenchard* v. *Hoskins* (1624), Win. 91; *Beck's Case* (1630), Litt. 344; *Williams* v. *Fry* (1672), 2 Keb. 756, 787, 814, 867; *Austin* v. *Lippencott* (1673), 1 Mod. Rep. 99; *Green* v. *Horne* (1693), 1 Salk. 197; *Goodridge* v. *Goodridge* (1742), 7 Mod. Rep. 453; *Walpole* v. *Cholmondeley* (1797), 7 Term Rep. 138; *Doe d. Ellis* v. *Ellis* (1808), 9 East, 382; *Doe d. Jersey* v. *Smith* (1819), 1 Brod. & Bing. 97; *Smith* v. *Jersey* (1821), 3 Bli. 290; *Miller* v. *Travers*, [1824–34] All E.R.Rep. 233; *Doe d. Gord* v. *Needs* (1836), 2 Gale, 245; *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354.

As to extinction of rights of action, see 1 Halsbury's Laws (3rd Edn.) 14, 15, and as to construction of deeds, see ibid., vol. 11, pp. 381 et seq. For cases see references at 1 Digest (Repl.) 80; 17 Digest (Repl.) 253 et seq.

Cases referred to:

(1) *Hall* v. *Kirby* (1562), 2 Dyer, 217 b; 1 And. 8; Ben. & D. 126; 73 E.R. 481; 12 Digest (Repl.) 572, *4371*.

(2) *Corbet's Case* (1600), 1 Co. Rep. 83 b; Moore, K.B. 633; 2 And. 134; 76 E.R. 187; 38 Digest (Repl.) 835, *478*.

(3) *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a; 1 And. 348; 3 Leon. 271; Moore, K.B. 254; Poph. 87; 76 E.R. 684; 17 Digest (Repl.) 218, *173*.

(4) *Hoe's Case* (1592), 5 Co. Rep. 70 b; 77 E.R. 161; sub nom. *Hoe* v. *Marshall*, Cro. Eliz. 579; sub nom. *Hoo* v. *Marshall*, Gouldsb. 166; 12 Digest (Repl.) 571, *4351*.

(5) *Nichols* v. *Nichols* (1575), 2 Plowd. 477.

(6) *Pecke* v. *Redman* (1556), 2 Dyer, 113a.

(7) *Reade* v. *Bullocke* (1544), 1 Dyer, 56 b; 73 E.R. 125; 17 Digest (Repl.) 261, *644*.

Writ of Dower brought by Thomas Lawrence and Marcia, his wife, against Edward Altham and Margaret, his wife.

The plaintiffs made demand to be endowed of the third part of 100 acres of land, 10 acres of meadow, and 60 acres of pasture, with the appurtenances, in Gosfield, in the county of Essex, as the dower of the said Mercia, of the endowment of Thomas Nash the elder, her late husband. The tenants pleaded in bar that Thomas Nash was seised of the tenements aforesaid in fee and held them in socage, and on April 10, 1592, by his will in writing, devised the said tenements

to Zachary Nash, his younger son, for the term of his life, and afterwards died thereof seised. After his death Zachary entered, and was thereof seised for the term of his life, and the reversion of the said tenements descended to Thomas Nash, son and heir of Thomas, the husband, and afterwards Marcia one of the demandants in her widowhood, when she was sole, on or about April 27, 1592, by her deed did remise, release, and for her, her heirs, executors, and administrators, for ever quit claim to Thomas Nash, the son,

> "omnes et omnimodas actiones, tam reales quam personales, sectas, querelas et demanda quæcunque quæ ipsa Marcia vel executores sui versus præfat' Thomam Nash filium vel executores suos unquam habuisset seu habuissent, tunc habuit vel habuerunt seu quovismodo tunc in futurum habere potuisset vel potuissent, ratione alicujus rei, causæ vel facti cujuscunque ab origine mundi usque diem dat' ejusdem scripti relaxationis."

Afterwards Thomas the son died seised of the reversion, after whose death it descended to Margaret, wife of Edward Altham, the other of the tenants, and afterwards Zachary died, and Margaret entered. The demandants demanded oyer of the deed, which was read to them in these words, omnibus Christi fidelibus ad quos. The demandants replied and said that Thomas Nash the father, was seised in his demesne as of fee, as well of the tenements in G. aforesaid, as of two messuages, and 200 acres of land in Wethersfield aforesaid, and by his will in writing devised the said tenements in G. to Zachary Nash, and afterwards died, after whose death Thomas Nash, the son, entered into the tenements in Wethersfield as his son and heir and was seised thereof in fee, and Zachary entered into the lands in Gosfield. Zachary was at the time of the death of Thomas the father, of the age of three years, wherefore Marcia, as guardian by nature, entered into tenements in G. and that afterwards, and before the said release, it was concluded and agreed by Marcia, when she was sole, and Thomas Nash the son, that Marcia should release to Thomas Nash the son, all her dower of the tenements in Wethersfield aforesaid, etc., and that Thomas the son so seised of the tenements in Wethersfield, and Marcia so possessed of the tenements in G. she made the release, etc., and afterwards Zachary died, etc., upon which the tenants demurred in law.

Two questions were moved and argued at the Bar and Bench. The first was whether the release made by the wife to him in reversion expectant on an estate for life, should extinguish her dower. The second was whether the foreign concord and agreement of the parties should qualify the force of any of the words of the release. As to the first, the said deed of release was divided into three parts. In the first was considered the words of the release; in the second the words of qualification; and in the third, the words of relation. As to the words of the release, **SIR EDWARD COKE, C.J.,** said: They appear to be of two sorts, the one general, the other special. The general contains four words, actiones, sectas, querelas et demanda: the special contains three, dotem, titulum, et actiones dotis. The words of qualification are, mihi contingent' per mortem dicti Thomæ nuper viri mei, de aliquibus terris et tenementis suis in W. præd'. The words of relation, or relative words are, quæ vel quas ego præfat' Marcia vel executores mei versus ipsum Thomam, etc., unquam habui, habeo, seu quovismodo in futurum habere potero ratione alicujus rei, etc. As to the first word (actiones), it was resolved that in this case the release of all actions real to Thomas the son, having but a reversion expectant on a freehold, did not extinguish the dower, because actio est jus prosequendi in judicio quod alicui debetur, as it is described in *Hall* v. *Kirby* (1) (2 Dyer, 217 b) out of Bracton, lib. 3, c. 1. The wife cannot sue Thomas the son, to recover her dower by judgment, because he is not tenant to the præcipe, nor can he render dower to her, for at the time of the release Zachary was tenant of the freehold, and Litt., Release, fol. 115, holds that in actions real which ought to be sued against the tenant of the freehold, if the tenant has a release of actions real of the demandant made to him before the writ purchased and he pleads it, it is a good plea for the demandant to say that he who pleads the plea had nothing

in the freehold at the time of the release made, for then he had no cause to have any action real against him.

Therefore, **SIR EDWARD COKE, C.J.,** said: If one releases to him in the reversion expectant on an estate for life all actions real, and afterwards tenant for life is impleaded, and prays in aid of him in reversion, or vouches him, or he is received in these cases (as it is there said) although præcipe be not begun against him, yet forasmuch as by the receipt or voucher he is become tenant to the præcipe of him who made the release, and shall be bound by the judgment, he shall have advantage to plead the release of all actions real, but the doubt is because at the time of the release made, he had no cause (as Litt. says) to have any action against him, but doubtless, after receipt or entry into the warranty by the vouchee, a release by the demandant to the tenant by receipt, or the vouchee, is good, because both, at the time of the release made, were tenants in law to the demandant, but a release to them by any stranger is not good: vide Year Books 7 Edw. 3, 46; 18 Edw. 3, 12; 8 Hen. 4, 5 a.; 7 Edw. 4, 13 b.; 20 Hen. 6, 29; 22 Hen. 6, 12; 5 Hen. 7, 41, a.; Litt. 114 b.; 1 Co. Rep. 87 b [*Corbet's Case* (2)]; 3 Co. Rep. 29 b [*Butler and Baker's Case* (3)]. But if the wife had released totum jus, all her right to him in the reversion, her dower had been extinct, because her dower would accrue to the demandant, not only out of the estate for life, but also out of the reversion, and that was affirmed for good law, as well at the Bar by both parties, as at the Bench, according to the book of 16 Edw. 3, cited in *Hoe's Case* (4) (5 Co. Rep. at p. 71 a). For when the right, which is the foundation and principal, is released, by consequence the action, which is but the mean to recover it, is also released. That appears in Year Books 9 Hen. 6, 47; 10 Hen. 4, 6; 21 Hen. 7, 23; 19 Hen. 6, 4, and, therefore, jus is well divided in 2 Plowd. at p. 487 b in *Nichols* v. *Nichols* (5), where it appears that Jus est sextiplex, scil. 1. Jus covuperandi, i.e. prosequen'; 2. Jus intrandi; 3. Jus habendi; 4. Jus retinendi; 5. Jus percipiendi; 6. Jus possidendi. Therefore, when a man releases totum jus generally, all his rights are thereby released. But if the disseisee released to the disseisor, omnes action', i.e., jus recup' sive prosequen' in judic', his right of entry is not thereby released, for when a man has divers means to come to his right, he may release one of them specially, and yet take benefit of the other. Therewith Littleton agrees, fol. 115 b., and 19 Lib. Ass. pl. 3; Year Books 19 Hen. 6, 4; 21 Hen. 6, 23; 21 Hen. 7, 23.

But when a man has not any means to come to the land but by way of action, there, if he releases all actions, thereby his right inclusive, by judgment of law, is gone, because by his own act he has barred himself of all means and remedies to recover or attain to it: for a release of all advantages upon the account, is a good bar in an action of debt upon the account: Y.B. 9 Edw. 4, 49. Therefore, if the disseisee releases all actions to the heir of the disseisor, thereby his right in judgment of law is gone. But if the heir of the disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life all actions which he has against him, and afterwards tenant for life dies, the disseisee, notwithstanding this release, shall have an action against him in remainder, for he releases but the action, and the act in law never extends the act of the party further than his express words, as if the lord disseises his tenant, and makes a lease for life, this release in law shall be but for the life of the lessee, for it is true, that fortior et potentior est depositio legis quam hominis, and so it is true, that fortior et æquior est depositio legis quam hom'. Ipsæ etiam leges capiunt ut jure regantur. But if the disseisee releases all actions to the disseisor, and afterwards the disseisor dies seised, and afterwards the disseisee dies, there, a right descends to the heir of the disseisee, because, notwithstanding the release, a right remained: vide Y.B. 21 Hen. 6, 1, the opinion of Newton. And it was observed, actio est jus prosequendi in judicio; and, therefore, by the judgment, the action is determined, for the judgment is the end of the action (jus prosequendi in judicio) and, therefore, a release of all actions is no bar of executions and therewith agrees Y.B. 26 Hen. 6, Execution 7; Br. Releases 87, Y.B. 19 Hen. 6, 4, and Litt. 116 b. But in a scire facias grounded upon a judgment, a release of all actions is a good plea,

because he shall have a new judgment, and, therefore, there it may well be called jus prosequendi in judicio, and, therewith, agrees Y.B. 18 Edw. 4, 7 B. Then the words further are, quod alicui debetur, i.e., which is due to any, so that by release of all actions, real and personal, such actions are only released in which the plaintiff should recover anything in the realty or the personalty which is due to him, which is included in these words, quod sibi debetur.

Therefore, if a man is outlawed in a personal action by process upon the original, and brings a writ of error, and he pleads against him a release of all actions personal, that is no plea, for by the said action he shall recover nothing that is due to him, but he shall only reverse the outlawry to discharge himself of that disability. So that the said writ of error does not agree with the said description of an action, for it is not jus prosequendi in judicio quod sibi debetur but in such a case a release of writ of error is a good plea.

Therewith LITTLETON agrees, 116 b., and Y.B. 11 Hen. 4, fo. 6, pl. 14, where the case was: Trescullard brought a writ of error against T., son and heir of John Penros, upon a judgment against him in a writ of redisseisin, at the suit of the said J. Penros, and also of an outlawry thereupon against him pronounced for that cause, and assigned two errors—one, because the sheriff took the inquest in the town, and not on the land, according to the statute, and secondly, because the sheriff made a precept to a bailiff to summon the jury who returned a panel, which was removed hither as parcel of the record, and the sheriff took the inquest by some who were not returned by the bailiff. There HULS, J., as to the first error, said, if the sheriff cause the jury to view the waste, he may take the inquest at another place, so here. As to the second error he said that the sheriff may vary from the return of the bailiff, for the sheriff himself is the person who makes the array, who is also a judge in the case. GASCOIGNE, J.: If the sheriff had not made the precept and the return by the bailiff had not been made parcel of the record, it would be as you say, but he has sent this return as parcel of the record, whereby he affirms the return of the bailiff, and if he had made process against the jury by habeas corpus and had taken the inquest by others, it is error, quod HULS, J., concessit. ROLFE, of counsel, with the defendant in the writ of error pleaded that the plea should not be received to assign error, for after the judgment the plea in the writ of error, by his deed which is here, released to the said J. Penros, who recovered in the writ of redisseisin all his right in the land, and all actions and demands, and although both the errors were assigned in the principal record, and thereof by the said release he is stopped to assign error; and although the outlawry was good in process, yet because the record and judgment are the original of the process of the outlawry, therefore, if there be defect in the original judgment, the outlawry which is depending upon it, is reversible by GASCOIGNE, J., quod HULS, J., affirmavit, wherefore he reversed the outlawry, notwithstanding the release. Which judgment agrees with LITTLETON, and is worthy observation in the principal point of judgment.

So if the body of a man condemned in debt be in execution, and the plaintiff releases the debt, and all executions, and the defendant releases to the plaintiff all actions, yet upon the release of the plaintiff he shall have an audita querelat, for thereby he shall recover nothing, but discharge his body of imprisonment. But if the plaintiff after judgment releases to the defendant all actions, and afterwards his body is taken in execution, he shall not have an audio querela thereupon, for an execution is no action, as has been said before, and therewith agrees Y.B. 13 Hen. 4, Release 53. Also it was observed, upon these words (quod alicui debetur), that in some case a debt or duty shall be barred by a release of all actions, although no action at that time lies for the debt, as if a man be bound to another in a certain sum, to be paid at the feast of St. Michael next following, if the obligee before the feast releases to the obligor all actions, he shall be barred for ever of the duty, for it is debitum presently, although it be not presently solvend': and, therefore, if one be bound to another in £40 to be paid at four usual feasts of the year, and three of the feasts are past, in that case for £30 there is debitum and

A solvend' also, and yet the obligee shall not have an action of debt till the last feast be past, and notwithstanding that a release of all actions before the last feast discharges all. But if a man leases land to another for the term of a year, rendering £40 rent, to be paid at the four usual feasts by equal portions, in this case if one feast be past, he shall have an action of debt presently, and shall not tarry till all the days be past, for there, the duty accrues upon the receiving of B the profits of the land, and till the feast incurred in which it is to be paid, there is neither debitum nor solvend'. Therefore, there a release of all actions before the feast is no bar, but in respect of the several perception of the profits of the land, the rent after every feast is demandable by action of debt, and so stude causam diversitatis made in Litt. 117 (which was never added by Littleton himself) is well explained. Therewith agree Year Books 7 Hen. 6, 26 a.; 45 C Edw. 3, 8 a. L.; 5 Edw. 4, 41 b.; 13 Hen. 4, Avowrie 240. Vide 2 Dyer 113 a [*Pecke* v. *Redman* (6)]; Dyer, 108, upon assumpsit or covenant in which damages are to be recovered, an action lies after the first day, and Fitzherbert's Natura Brevium, 267 and 16 Edw. 3, fieri facias 4, that upon a recognisance which is a judgment in law, execution lies after the first day, and so all the books are well reconciled and agree.

D Wherefore it was concluded in the case at Bar, that by the release of all actions made to him in reversion the dower of the wife was not barred, because at the time of the release she had no cause of action against him. As to this word (querelas) it is to be known, that quarrels extend not only to actions as well real as personal, as it is held in Y.B. 9 Edw. 4, 44 a., but also to causes of actions and suits, as it is held in Y.B. 39 Hen. 6, 9 b. So that by release of all quarrels, E not only actions depending in suit, but causes of action and suit are also released. And so it is where one releases to another all actions, not only actions depending, but also causes of actions are released. Vide Y.B. 35 Hen. 8, 57; *Hall* v. *Kirby* (1); Trinit. 4 Eliz. Rot. 1027, etc. This word querela is derived a querendo, unde etiam querens who is the plaintiff, and quarrels, controversies and debates, are synonima, and of one and the same signification. For this word (sectas) is to be F known that by release of all suits, executions are barred, for none shall have execution without suit or prayer, and therewith agree Year Books 9 Hen. 6, 4; 26 Hen. 6, Execution 7, and Br. Releases 87. So by release of all duties, as well executions as actions are released. But a release of suit or quarrel is not in this case any bar of dower, no more than by a release of them, a covenant before the breach thereof is released, because the covenantee has no cause of action or suit G before the covenant broken. As to this word (titulum) (which is mentioned in the particular clause) it has two significations, one properly and strictly, as for a title for which no action lies, as for a condition broken, or upon alienation in mortmain, etc., and so it is taken in Plow. Com. in *Nichols* v. *Nichols* (5). In another signification it is taken largely, and in this sense, titulus est justa causa possidendi quod nostrum est, and signifies the title which one has to land, as by fine, feoff- H ment, etc., or by descent, etc., and, therefore, when the plaintiff makes a title in an assize, the tenant may say, let the assize come upon the title, which is as much as to say, upon the particular conveyance, etc., which he makes to the land, etc., and it is called titulus a tuendo, quia thereby he defends his land, et plerumque constat ex munimentis quæ muniant et tuentur causam. By release of all title to land, etc., all his right is extinct, for it shall be taken strongly against him, I and in the largest sense. So when a man has title in the proper sense, either by a condition or by alienation in mortmain, the release of all his right will extinguish this title, for he has jus possidendi, and therewith agrees Y.B. 6 Hen. 7, 8 a. The English poet said: "For true it is, that neither fraud nor might, can make a title where there wanteth right."

The last of the four general words in the deed is (demanda) quod est vocabulum artis, and if one releases to another all demands, it is (as Litt. says, 117, a) the best release to him to whom the release is made, that he can have, and shall enure most to his advantage, for thereby not only all demands, but also all causes of

demand, are released. There are two manner of demands, scil. in deed, and in law. In deed, as in every præcipe there is an express demand; and thereupon in real actions he is called demandant; in law, as every entry into land, distress for rent, taking or seizure of goods, and the like acts in pais, which may be done without any words, are demands in law. As a release of suits is larger and more beneficial than a release of quarrels, or of actions, so a release of demands is more large and beneficial than any of them, for thereby is released all that is by the others released, and more. By release of all demands, all freeholds and inheritances executory are released, as rents, and the like: 20 Lib. Ass. p. 5; Y.B. 14 Hen. 8, 9, 10. By release of all demands, all executions are released: Y.B. 26 Hen. 6, Execution 7; Y.B. 19 Hen. 6, 4; Litt. 117; Y.B. 40 Edw. 3, 51. By release of all demands, to the disseisor, the right of entry to the land, and all that is contained in it is released: Y.B. 6 Hen. 7, 15. So it is resolved by all the justices in *Chauncey's Case*, 34 Hen. 8, Br. Release 90, that he who releases all demands excludes himself from all actions, entries, and seisures. Litt., c. Warranty 170 a, holds that if tenant in tail enfeoffs his uncle, who enfeoffs another in fee with warranty, if afterwards the feeffee by his deed releases to his uncle all manner of warranties, or all manner of real covenants, or all manner of demands, by such release the warranty (which is a covenant real and executory) is extinct, and the reason of all this was because by release of demands, all the means and remedies, and the causes of them, which anyone has to lands, tenements, goods, chattels, etc., are extinct; and by consequence the right and interest itself to the thing. Wherefore it was resolved, that in the case at Bar, by the release of all demands to him in the reversion, if the deed of release had not gone further, the dower of the said Marcia had been barred. Note, reader, although a release of all demands be of so great extent, yet it does not extend to such writs by which nothing is demanded either in fact or in law, but lie only to relieve the plaintiff by way of discharge, and not by way of demand, as appears before by the judgment in *Trescullard's Case*, in Y.B. 11 Hen. 4, fo. 6, pl. 14, where a release of all demands is no bar in a writ of error to reverse an outlawry, et sic in similibus: vide Year Books 40 Edw. 3, 22; 13 Rich. 2, Avow. 39 (89).; 18 Edw. 3, 59; 14 Hen. 4, 4, etc., where by release of all demands, future incidents are released, and where not: vide 2 Plowd. at p. 484, in *Nichols* v. *Nichols* (5) for this word (interesse).

As to the second part of the deed, scil. to the words of qualification, it was resolved that as well the first words, as the subsequent words special, extend only to release all actions, suits, quarrels, demands, title and dower, etc., de aliquibus terris et tenementis suis in Wethersfield, and not to any lands and tenements in Gosfield, for the said latter words, mihi contingent' per mortem dicti Thomæ, qualify the said general words and restrain all the first words to the lands or tenements in Wethersfield, and that for three reasons: (i) because all the said three parts of the deed, scil, the words of release, the words of qualification, and the words of relation are but one period and one sentence, for this conjunction (necnon) conjoins the general words to the words of qualification, and the relative words refer to all the words, as well general as special, and also to the words of qualification as shall hereafter appear, and, therefore, the whole is but one and the same sentence; (ii) if the general words should stand without any qualification, then the special words would be altogether vain and of no effect, et maledicta expositio est quæ corrumpit textum. The third and the principal reason is upon a maxim and principle of the law, scil. quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia. The same rule almost word for word is put and agreed on both sides in Y.B. 7 Edw. 3, at fo. 10, pl. 20, *Margery Mortimer's Case*:

> "Where a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words"

A as if a man grants a rent in manerio de D' percipiend' in 100 acres of land, parcel of the same manor, with clause of distress in the 100-acres, the rent shall issue out of the 100 acres only, and the general words shall be construed according to the special words. So it is there also said, if a man grants a rent (and goes no further) these general words shall create an estate for life, but if the habendum be for years, it shall qualify the general words. All this appears in the said B Year Book of 7 Edw. 3. So if a man gives land to one and his heirs, habendum to him and the heirs of his body, he shall have but an estate in tail, and no fee expectant, for the habendum qualifies the general words precedent. Therewith agree 35 Lib. Ass. p. 14; 37 Lib. Ass. p. 5; and Perkins, 35 b, against the opinion obiter in Y.B. 21 Hen. 6, 24. But if a man gives lands in the premises to one and the heirs of his body, habendum to him and his heirs, he has an estate-tail and a C fee simple expectant, for that stands upon another rule or principle in law, scil. generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa. Therefore, when the deed at the first contains special words, and afterwards concludes in general words, both words as well general as special shall stand, and it is well said in *Reade* v. *Bullocke* (7) (2 Dyer, 56) subsequent words may qualify and abridge, but not destroy the generality of the words precedent: vide 1 Dyer, D 50; 21 Lib. Ass. p. 10, and Y.B. 2 Edw. 3, 33 b.

To the last part of the deed, the relative words (quæ vel quas, etc.) it was resolved that they refer as well to actions, etc., and demands, as to the special words, for it would be against reason that they should refer to general words, which are more remote, and not to the words of qualification which are immediate and next to them, and that is so clear and perspicuous of itself that it is not worthy of E any argument or proof to confirm it.

For the second point of the case it was resolved that the foreign or collateral averment out of the said deed was not of any force or effect in law, for every deed consists upon two parts, matter of fact, and upon the construction in law. Matter of fact is to be averred by the party, and triable by the jurors: the other, being matter in law, is to be discussed by the judges of the law, and quemadmodum ad F quæstionem facti non respondent judices; ita ad quæstionem juris non respondent juratores. Therefore, if A. levies a fine to William his son, to have and to hold to him and his heirs, upon this fine the judge cannot make question for any matter of law, but now the party comes and avers matter in fact; and says that A. had two sons named William, an elder and a younger, and his intent was to levy the fine to William the younger. This averment out of the fine is good of this G matter of fact, which well stands with the words of the fine, and shall be tried by the country, and therewith agrees Y.B. 47 Edw. 3, 16 b. But if a man by deed gives goods to one of the sons of I.S. who has divers sons, here he shall not aver which son he intended, for by judgment in law upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment: vide Y.B. 11 Edw. 4, 2 a. So, if a man levies a fine of the manor of Soure, or of the manor H of Dirtleby, to two et heredibus, and in truth there is the manor of North Soure and South Soure or Great Dirtleby and Little Dirtleby, in this case issue may be taken dehors which manor the cognizor intended to pass, for that is matter of fact not apparent in the fine, whereof the judge cannot take cognisance, but it stands well with the fine and shall be tried by the jury. Therewith agree Year Books 12 Hen. 7, 7; 26 Hen. 8, 6 a.; 19 Edw. 2, Grants 93, but where the words I are in the limitation of the estate to two et heredibus, that is apparent in the fine, and by judgment of law, these words et heredibus are uncertain and void, as it is adjudged in Y.B. 22 Hen. 6, 15 b.; vide Year Books 19 Hen. 6, 73 b.; 20 Hen. 6, fo. 35, pl. 5; 22 Edw. 4, 6 (16) b., and no averment dehors can make that good which upon consideration of the deed is apparent to be void. So if a man makes a feoffment to one and his heirs, no averment can be taken that the intent of the parties was that the feoffee should have but an estate to him and the heirs of his body, for such averment would be against the judgment of the law, which appears to the judges upon the view of the deed. So in the case at

Bar, if the general word (demanda) had in law, by the judgment of the judges, upon the consideration of the whole deed of release barred her of her dower, no foreign or collateral averment dehors could qualify or abridge the force and operation of the said word, but it ought to be qualified by apt words contained in the deed itself, as in this case it was.

Judgment for plaintiffs.

GOODTITLE d. CHESTER *v.* ALKER AND ANOTHER

[Court of King's Bench (Lord Mansfield, C.J., Denison and Foster, JJ.), February 4, 1755, January 28, 1757]

[Reported 1 Burr. 133; 1 Keny. 427; 97 E.R. 231]

Highway—Owner of soil—Rights—Profits from ownership—Mining under highway—Encroachment by stranger—Recovery of possession.

The subjects of the sovereign have nothing beyond a right of passage over the surface of a highway. The freehold in the soil and all profits therefrom belong to the owner of the soil, as in the case of trees, and he has the right to work mines under the highway, lay pipes to carry water, and so on. If any person encroaches on the highway the landlord may recover possession subject to the right of the sovereign's subjects to pass over the highway. An action for trespass will be for any injury done to the highway.

Notes. Referred to: *Thompson* v. *West Somerset Mineral Rail. Co.* (1857), 29 L.T.O.S. 7; *Harrison* v. *Duke of Rutland* [1891–4] All E.R.Rep. 514; *London City Tax Comrs.* v. *Central London Rail. Co.*, [1913] A.C. 364.

As to rights of owner of soil of highway, see 19 Halsbury's Laws (3rd Edn.) 64–70. For cases see 26 Digest (Repl.) 333 et seq.

Cases referred to:

(1) *Selman* v. *Courtney* (1740), 12 Vin. Abr. 78, 79, pl. 91, n.
(2) *Duchess of Marlborough* v. *Gray* (1728), unreported.
(3) *Banister* v. *Benjamin* (1540), 1 Dyer, 47 a.
(4) *Wray* v. *Foss* (1735), cited 1 Burr. at p. 140.
(5) *Baldwin* v. *Wine* (1632), Cro. Car. 301.

Also referred to in argument:

Lade v. *Shepherd* (1735), 2 Stra. 1004; 93 E.R. 997; 26 Digest (Repl.) 339, *589*.
Jordan v. *Cleabourne* (1593), Cro. Eliz. 339.
Welden v. *Bridgewater* (1592), Moore, K.B. 302; Cro. Eliz. 421; 72 E.R. 594; 2 Digest (Repl.) 39, *186*.
Wrey v. *Vesper* (1610), Cro. Jac. 263.
Knight v. *Symms* (1692), 4 Mod. Rep. 97; Carth. 204; 1 Salk. 254; 1 Show. 338.
Trevivian v. *Lawrence* (1704), Holt, K.B. 282; 2 Ld. Raym. 1036, 1048; 6 Mod. Rep. 256; 1 Salk. 276; 3 Salk. 151; 87 E.R. 1003; 21 Digest (Repl.) 256, *370*.

Ejectment for an acre of land lying in the parish of St. Philip and Jacob in the county of Gloucester.

By their special verdict the jury found, as to one piece of land fourteen inches in length and thirty-three feet in breadth (parcel of the premises), and as to one other piece of land three feet six inches in length and seven feet in breadth (other parcel of the premises), and as to one other piece of land containing two feet in depth and fourteen feet in length (other parcel of the premises contained in the declaration), that Thomas Chester was in 1648 seised in his desmesne as of fee of and in the manor of Barton Regis in the county of Gloucester, with the appur-

A tenances. On June 24, 1648, certain articles of agreement were made between him and one John Gotley, otherwise Dowle, reciting a presentment by the homage at a court leet of the manor, held on April 10, 1648,

> "that the said John Gotley alias Dowle, in the new building of a house at Lafford's Gate, had encroached upon the waste of the said Thomas Chester
B then and yet lord of the said manor, fourteen inches in length and thirty-three feet in breadth, without his house; together with a porch, without the wall adjoining to the said house, of three feet and a half; for the which encroachment, the said John Gotley alias Dowle was by the said jury amerced, as by the presentment aforesaid, in the rolls of the said court, appeared."

Thomas Chester and John Gotley then agreed, not only concerning the said amercia-
C ment (whereof Chester acquitted and discharged Gotley), but also Chester, for the consideration thereafter mentioned, agreed to permit and suffer Gotley, his executors and administrators, to continue the peaceable enjoyment of the ground and waste encroached without his disturbance, and also to have liberty to set and place a post in the street, and three other posts, etc., without any disturbance or trouble by him, Chester, for the term of 100 years from the day of the date
D of the said articles. In consideration whereof Gotley agreed to pay to Chester the sum of 6s. 8d. per annum yearly, during the said term: in consideration whereof Chester granted and agreed to let the said encroachment or encroachments to stand for and during the term without any disturbance, so as the yearly rent of 6s. 8d. be duly paid. It was further found that the two first pieces of land particularly mentioned and described in the verdict were the two several pieces of
E land mentioned in the articles to be encroached on by Gotley, and parcel of the waste, and part of the tenement in the declaration mentioned, and were so encroached and taken in by Gotley in the building or erecting the messuage or house mentioned in the articles some small time before the date of the articles, and then were lying in and part of the manor, and were part of a public street and King's highway, called West Street, in the parish of St. Philip and Jacob in
F the county of Gloucester, leading from the city of London to the city of Bristol.

The jury likewise found that the yearly sum of 6s. 8d. was duly and constantly paid, in pursuance of the articles, by the defendants and those whose estate they had, to Chester and the successive lords of the said manor, his descendants, during all the term of 100 years, and from the end thereof, till Lady Day, 1750. Then they found that the defendants Alker and Elmes, sometime in the year 1748, erected
G certain palisadoes before the front of the house, and thereby enclosed the third piece of land, above particularly mentioned and described, then lying in and being part of the manor, and being then other part of the said public street and highway, and had kept the same so enclosed ever since to this time, and that that part of the street where the encroachments were so made, at the time of the encroachments, contained in breadth (including the encroachments) sixty feet and no more.
H Thomas Chester, the lessor of the plaintiff, was heir-at-law to that Thomas Chester, deceased, who executed the articles, and, as such, to be seised of the manor with the appurtenances, as the law required. Being so seised, he made the demise to the plaintiff, by virtue of which demise, he entered, and was ejected. But the jurors said that they were wholly ignorant whether upon the whole matter by them found, the defendants were guilty of trespass and ejectment, as to the three
I pieces or parcels of land, by them supposed to be done, or not, and so the verdict concluded in the ordinary form.

LORD MANSFIELD, C.J.—As to the question whether an ejectment will lie by the owner of the soil for land which is subject to passage over it as the King's highway, 1 ROLL. ABR. 392, letter B., pl. 1, 2, is express that the King has nothing but the passage for himself and his people: but the freehold and all profits belong to the owner of the soil. So do all the trees upon it, and mines under it (which may be extremely valuable.) The owner may carry water in pipes

under it. The owner may get his soil discharged of this servitude or easement of a way over it by a writ of ad quod damnum. It is like the property in a market or fair. There is no reason why he should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement. An assize would lie, if he should be disseised of it. An action of trespass would lie for an injury done to it.

I find by *Selman* v. *Courtney* (1), that a point which had been before the Court of Exchequer in *Duchess of Marlborough* v. *Gray* (2) is now settled, viz., "that its being a highway cannot be given in evidence by the defendant, upon the general issue," which proves that the ownership of the soil is not in the King. I see no ground why the owner of the soil may not bring ejectment as well as trespass. It would be very inconvenient to say that in this case he should have no specific legal remedy and that his only relief should be repeated actions of damages for trees and mines, salt-springs, and other profits under ground. It is true, indeed, that he must recover the land, surface to the way, but surely he ought to have a specific remedy to recover the land itself, notwithstanding its being subject to an easement upon it.

On the second question, as to the description. I do not know whether it is not even better described by the name of the land than of a house, or part of a house. I think it would have made the objection much stronger if the plaintiff had only claimed the nuisance instead of the land on which the nuisance is erected. Here he does not claim the nuisance. He claims the land, and the tenants in possession of it defend themselves by saying that they have erected a nuisance upon it. It would be a strange thing, if that should be a good defence against the owner's recovering his land. However, this is not a house (which, perhaps, ought, if it were so, to be particularly named), but merely a wall or part of a wall or building, and there is not such preciseness required in ejectment as there is in real actions.

The courts will go to the utmost extent in support of ejectments that people may have specific remedies for their rights.

DYER 47 a., pl. 6 [*Banister* v. *Benjamin* (3)] is very strong. There the recovery was of "100 acres of land, 20 acres of meadow, and 40 acres of pasture, in D." without mentioning any house or garden. The better opinion seems to be that the plaintiff should thereby recover the buildings built thereupon. That was an action of a higher kind than an ejectment. It was a real action, a writ of intrusion, in which that recovery was had. But here the building erected is only part of a house or wall, and it is erected, by encroachment, upon the plaintiff's land. The case of the defendant is most unfavourable, for he insists upon holding the thing demanded without any pretence of title, and insists that the plaintiff shall have no specific remedy for his land. Therefore, I am of opinion that the plaintiff ought to recover upon this special verdict.

DENISON, J.—The difficulty at the assizes arose as the judge who tried the cause has declared, merely upon an apprehension that there had been a determination at the assizes formerly by LORD HARDWICKE, that an ejectment would not lie for a property in soil over which there was a highway because the sheriff could not deliver possession of the highway. The reality of this authority has not been at all proved to any kind of satisfaction. Trespass would undoubtedly lie. Why then should not an ejectment? It is said that the sheriff cannot deliver full possession. But why not? Indeed, possession must be subject to the easement, but there is no other difficulty in the matter. Therefore, I take it for granted that there was something more in that cited case of Sir Bourchier Wray's [*Wray* v. *Foss* (4)], than we are now apprised of.

As to the second question, it might have been, perhaps, difficult to have described this part of a house. In *Banister* v. *Benjamin* (3) I take it that the formedon in reverter [a writ brought by the reversioner or donor of an estate tail when it was in the possession of a person not entitled to it: abolished by Real Property Limitation Act, 1833, s. 36] was well brought for the land, secundum formam doni. The

plaintiff had nothing to do with what the defendant had done with it, or built upon it. I think the four judges who held on that side of the question were in the right. On this special verdict, the sheriff would have no difficulty to deliver possession. I think that *Banister* v. *Benjamin* (3) is good law. That was in a real action, and much more will the same reason hold upon ejectment, which would even lie for tithes: see *Baldwin* v. *Wine* (5). I think this ejectment was better and more properly brought for land, than it would have been for part of a house.

FOSTER, J., agreed that *Banister* v. *Benjamin* (3) was good law. He had no doubt of the present case when it was before him at the assizes, but from the then apprehended authority of the cited case [*Wray* v. *Foss* (4)], said to be determined by LORD HARDWICKE. He continued: The owner of the soil has a right to all above and under ground, except only the right of passage, for the king and his people. The case in 1 ROLL. ABR. 392, letter B, proves this: ibid., pl. 1, 2, 3, 4, 5 and 6. Therefore, he entirely concurred with his Lordship and DENISON, J.

Judgment for plaintiff.

EARL OF STAFFORD *v.* BUCKLEY

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), February 23, 1750]

[Reported 2 Ves. Sen. 170; 28 E.R. 111]

Rent—Annuity—Reservation out of a rent—Validity.

Per LORD HARDWICKE, L.C.: A rent charge cannot be reserved or granted out of a rent. Part of a rent may be granted indeed, but a new rent cannot be reserved or granted thereout because no distress can be taken of it.

An annuity in fee, granted by King Charles II out of the Barbados duties, **held** not to be a rent nor realty, nor within Statute of Frauds, nor the Statute De Donis. Being settled on A. and the heirs of her body, it amounted to a fee simple conditional at common law, the remainder over being void.

Notes. Considered: *Turner* v. *Turner* (1783), 1 Bro.C.C. 315; *Buckeridge* v. *Ingram* (1795), 2 Ves. 652. Followed: *Radburn* v. *Jervis* (1841), 3 Beav. 450. Considered: *Re Wynch's Trusts, Ex parte Wynch* (1854), 5 De G.M. & G. 188. Referred to: *Doe d. Chattaway* v. *Smith* (1816), 5 M. & S. 126; *Taylor* v. *Martindale* (1841), 5 Jur. 648; *Re Rivett-Carnac's Will* (1885), 30 Ch.D. 136.

As to the creation of rentcharges and annuities, see 32 HALSBURY'S LAWS (3rd Edn.) 540 et seq., and for cases see 39 DIGEST (Repl.) 118 et seq.

Cases referred to:

(1) *Forth* v. *Chapman* (1720), 1 P.Wms. 663; 2 Eq. Cas. Abr. 292, 359; 24 E.R. 559, L.C.; 48 Digest (Repl.) 445, *3971.*

(2) *Myles* v. *Williams* (1714), Gilb. 318; 93 E.R. 341; sub nom. *Miles* v. *Williams*, 10 Mod. Rep. 243; 1 P.Wms. 249; 8 Digest (Repl.) 613, *539.*

Bill to carry into execution the provisions of the marriage articles of the Earl of Stafford.

Richard Cantillon, in 1734, made his will, first, reciting the provision made for his wife on their marriage, and saying that, if there should be any deficiency in that, it should be satisfied out of his other effects. After giving several annuities and legacies, he said:

"I hereby constitute and appoint S. and G. joint executors of this will; praying them to see the said jointure and legacies paid"

and directed them to take care of the education of his daughter, to whom he gave

£200 per annum, until she married with their consent, or came of age. He then directed them to entail on his daughter and her issue all the estate and effects which should belong to him after payment of the aforesaid jointure, annuities and legacies, but in case of her death and failure of her issue he desired them to divide moietively between his two nephews:

> "My intention being that the capital be laid out and secured and the interest be made good to my daughter for life and to her lawful heirs for ever, but in case of her and their failure, the same shall go to my said nephews moietively."

This will was not executed according to the Statute of Frauds.

Lord Stafford having married the daughter with the consent of the executors, he and his wife brought this bill for the general purpose of carrying into execution the articles made precedent to their marriage, so far as they related to the estate of the testator, in which Lady Stafford was interested; to have an account of that estate so far as it came to the hands of any of the defendants; and to have that and the real estate of testator settled, conveyed, and disposed of according to the will and articles, and for that purpose to have several questions, made doubts between the parties, determined.

It was stated that the testator left £1,000 per annum, granted by King Charles II out of the Barbados duties. This was a grant of the profits arising to the Crown out of the island of Barbados in respect to the sovereignty of the Crown over that colony. It was paid to the Crown in sugar, in specie, the landholder not compounding for money. The grant was in consideration of a surrender of a title claimed under letters patent to the Caribbean islands, Lord Carlisle having had from King James I a grant of all these islands, but the colony succeeding, objections were made to that extensive grant, which produced an accommodation, viz., a certain annual payment out of those profits arising to the Crown in respect of the seigniory of the island, but that was not quite effectual to the grantee, prior charges exhausting it. Therefore, a new grant was made to Lord Kinnoul and his heirs, introducing collateral security, directing payment to be made in case of deficiency out of any other of the King's revenue as out of the excise which the King might charge as much as lands of the Crown, of which he was seised in fee. This grant in fee afterwards came to the testator.

LORD HARDWICKE, L.C.—The first question is whether this annuity is to be considered as in nature of a rent and to partake of the realty or as a mere personal thing to a man and his heirs inheritable according to such rules of descent as the law allows to such personal things.

I am clearly of opinion that it is mere personal annuity, having no relation to lands or tenements, or partaking of the nature of a rent by any means. First, this would be so if the fact was, as the plaintiff's counsel endeavoured to represent, as to this duty of four and a half per cent., but the fact fails them. Suppose it had been in the strongest manner for the plaintiff, viz., that King Charles I had granted these islands to Lord Carlisle with a reservation of a strict rent of four and a half per cent. in specie on the product of the islands, and afterwards King Charles II had granted £1,000 per annum in money out of the produce of that rent to Lord Kinnoul and his heirs. This would have been a mere annuity, even supposing that had been the case, because a rent cannot be reserved or granted out of a rent. Part of a rent may be granted, indeed, but a new rent cannot be reserved or granted thereout, because no distress can be or assize taken of it, as there is nothing to be put in view of recognizors of the assize, which the rule is, is necessary, and has been so determined. Consequently, if the four and a half per cent. in specie had been a rent like a corn-rent, this would not have been a rent, for this money to be paid out of that produce is another thing, and cannot be taken to be part of the old original rent which was reserved in specie. This is not like it. Consider the laws of Barbados (which is the principal, and, I believe, the rest of the

A Leeward Islands fall under the same rule) and the Act of Assembly, by which this is granted. It is in the express words of the grant a custom or impost, a duty on exports from the island, and no reservation out of the island, though it arises out of the produce, so that it has no relation to the case endeavoured to be made of it. Consequently, this annuity in fee is a personal inheritance, what the law suffers to descend to the heir, but has nothing to do with the realty, as appears B from Co. LITT. 20, and so not within the Statute of Frauds, for lands and tenements only are within it. An advowson comes, indeed, under that description, for it may be held under knight service, and rents partake of the nature of land, following that, and consequently are all within that statute, but nothing is within it which is not a real right or interest, or partaking of the realty, as this annuity is not, though granted in fee.

C The first remaining consideration is whether this, which appears to be a personal annuity in fee, and consequently a personal inheritance descendable to the heir, is concluded or comprised in the will so that the executors have an interest in or power over it, for it may be either way. The second consideration is as to the limitations to be made; how far by this will they may take effect, or are too remote.

D As to the first, I think, it is a question of some doubt, and yet I do not know that it will be of consequence between the parties. There are, to be sure, no words describing or giving it, nor has testator given any part of the real estate, nor could it be devised, if named, because not executed according to the Statute of Frauds. As to his personal estate, he has made no particular legacy of the residue of the personal so as to include personal things which would go to the executors; much E less personal things which would not go to executors, but are descendable to heirs according to a course of descent the law allows of as to that, but here are words that point that way, viz., estate and effects which are made use of more than once in the will. Where he intends to make a satisfaction to his wife for the deficiency of her provision on her marriage, he does it out of all his other effects, which words would have been sufficient to have charged any estate of his that could pass by F this will, whether such as is strictly personal and assets in the executors, or such personal as was descendable to the heir; therefore, sufficient to have charged this annuity to have made satisfaction to the wife if occasion to resort thereto, because there was a clear intent to provide a fund for that purpose, and that annuity would have passed by this will, if especially named. This is only an observation, not conclusive, on the nature of the will and use of the word "effects." In the clause G creating the present question he has given nothing to the executors, nor made them residuary legatees in trust, and, therefore, nothing vests in them, but what properly does so by naming them executors. All the rest of the personal estate that could pass to executors would go to them, but this is a kind of personalty, which according to DOCTOR AND STUDENT would not be assets in executors and consequently will not go to them by being named executors.

H The question is whether on these words to entail on her, compared with the former part, there is sufficient to pass by words or implication this annuity to the executors, or whether there are not words sufficient to give them power to convey. It is too much, perhaps, to say that these latter words are sufficient to pass any interest to them, provided that did not pass by naming them executors, which it did not, but why should it not give them a power to convey? For one may give a I naked power to executors to fell or convey, etc., without giving anything to them. Consider the words. The word "estate" is the most general that can be used, and according to all the cases sufficiently comprised all kinds of estates; especially when by saying "estate and effects" he points at both real and personal. Therefore, I do not see in point of law or reason why, if this will had been executed according to the Statute of Frauds, these words would not have enabled these executors to have settled his lands in England, for it was his intent that these executors should be his trustees for that and make a settlement of his whole estate, especially when it is said, after payment of the aforesaid jointure, etc., which carries me

back to the observation of the direction to make good the jointure, and, therefore, this direction to the executors is as large as that charge before. If, then, within this power lands would have been included, provided the will had been executed according to the statute (for at this day a man cannot give a power to his executors to sell his lands by a will not executed according to the statute). I see no reason why this annuity is not comprised, the words being general enough to take it in, and nothing in the nature of the estate preventing it operating upon it. I incline, therefore, that the executors have power to settle this annuity.

This leads to the next question. Supposing this annuity is included, and it is not doubted, but the residue vests in the executors eo nomine, in what manner is that to be settled, and how far is the limitation to take effect? I will consider this in two lights: first as to the annuity, which is not a personal thing to vest in executors eo nomine; next as to the surplus, which is merely personal, and would vest in them by virtue of making them executors.

As to the annuity, I think, it will fall under a different consideration from the rest of the personal estate. If estates of a different nature are comprised in this clause, *Forth* v. *Chapman* (1) is an express authority that the words shall receive a different construction according to the nature of these estates. Supposing, therefore, land was comprised in the direction of the trust, and the will so executed as to have affected lands, the court could not possibly have directed any other settlement of the land but to the daughter in tail. Undoubtedly so, if it had stood on the first words to entail on her, etc. How is it explained by the subsequent clause, wherein the testator has declared his own intent, and made the construction himself? There it would have been a direction, the settlement should be on her for life, but saying her lawful heirs for ever will be construed by the preceding word "issue," which will make an estate tail in her. So it would be as to land. The question then arises as to this particular instance of annuity, which is not real, but an inheritance of a personal thing descendable to the heir. The proper kind of limitation that is capable of it is distinct from mere personal goods and chattels. The testator, having purchased it, was seised in fee of it at the time of making the will and might direct it to be settled as far as by law allowed to be so; not by way of strict entail, because not within the Statute De Donis according to Sir Edward Coke. No writ of entry could be brought of it, nor is it real estate, and the very statute itself shows it in the beginning of it, nothing being included therein but lands and tenements and what partakes of their nature. Co. Litt. 20, says that in all these cases the grantee has a fee conditional as before the statute. The settlement, then, to be made of it, supposing the first question that it is included in this power in the will, is in this manner: to the daughter for life and the heirs of her body; which is in her a fee simple conditional. The executors then clearly could not carry it over in remainder to the nephews, for no remainder could be created of any estate not within the Statute De Donis, for before it was a possibility of reverter, out of which a remainder could not be, upon this notion, that being but a possibility it could not be grantable over, and if before the Statute De Donis a man had granted lands to another and the heirs of his body, and said in default of such issue over to B. and his heirs, that grant over would have been void, and on the having issue the condition would have been performed, and the grantee himself might have alienated so as to have barred the possibility of reverter. So here as this annuity is not within the statute De Donis, if settled according to this will to her for life and the heirs of her body, if carried over in default of such issue to the nephews that would have been void. As soon as issue had, the condition is performed; she might have alienated, and barred the possibility of reverter to the donor. Here issue has been had, and, consequently, an absolute fee must be, if a settlement is made according to this will. This I take to be the legal construction of this devise according to the different nature of these estates, and this (for I would not be misunderstood) will not affect those grants to which this has been compared, which have been frequent, of annuities by the Crown of this kind with remainders over, for though a common

A person cannot grant a possibility, the Crown can, as it may grant a chose in action. According to *Miles* v. *Williams* (2) (which is truly reported) his grantee may sue for it in his own name although a common person cannot grant a chose in action so as to enable the grantee to bring an action in his own name. I do not take it that before the Statute De Donis the possibility of reverter in the Crown could be barred, which distinguishes all these grants of the Crown from cases of common B persons. Therefore, on the directions in this clause, if a settlement had been made, the executors must have settled it to the daughter and the heirs of her body so as to be a fee conditional with a power after issue had to alienate, and to prevent possibility of reverter.

As to the residue, which is merely personal, it is different, for, according to *Forth* v. *Chapman* (1), a different construction may be put on the same words in C respect of estates capable of such a limitation in tail, and of those not capable of it. I am of opinion that the limitation contended for by the nephews is not so, nor was that the testator's intent, nor are the words capable of that construction, viz., that the daughter should have an usufructuary interest for life, etc. This must be considered of personal effects merely. The first words taken with the explanation afterwards made, show issue meant in the same sense as "heirs," and has D the same construction in wills according to all the cases, and that of Miss Dormer, in which I held that even where the first limitation was not for life, but to A., and, if A. dies without issue over to B., that was too remote because it was a failure of issue in infinitum, and that I could not be warranted to say, these words must be tied up to a dying without such issue or without heirs at time of the death. Here are no words to change "issue" from the common and legal con- E struction, for I do not see even in the subsequent words, which are insisted on, anything to restrain the failure of issue to the time of her death, but, let them fail at any time, the meaning was that it should go over. Here it is expressly given to the daughter for life, which words must be taken into construction of the first part, and explain them. In the former part he has explained his own meaning to be to make a settlement of this money to the line of heirs of the body of F his daughter in perpetuity, which intent, or of the limitation ever afterward, the law will certainly not admit, nor was anything further from his intent than to confine it to a dying without issue at the time of her death. Consequently, it is too remote, and the nephews can take nothing. But though bad as to the nephews, it may be good as to the issue to vest the property in them, but reserve that question (which, however, does not concern the annuity) till after the report.

G The only remaining question is as to the profits contended to be accumulated. I am of opinion that the true construction is that it is subject to the aforesaid annuities, etc., one of which was in fee. Nor does the testator import that the £200 was all she should have, and there are several instances where a particular sum is directed for maintenance and afterwards a settlement to be made notwithstanding, the £200 being only directed by her father to restrain what should be H for her maintenance. The profits, therefore, over and above the maintenance go and belong to the plaintiff. The £1,000 annuity and the surplus of the personal estate are subject to the power given to the executors, and the annuity, being capable of a limitation to the daughter and the heirs of her body, did by virtue of the will vest in her as a fee simple conditional at common law, and she, having had issue, is capable of alienating or settling the same and the limitation over I is void.

Order accordingly.

A

COWPER AND OTHERS *v.* EARL COWPER AND OTHERS

[Rolls Court (Sir Joseph Jekyll, M.R.), Michaelmas Term, 1734]

[Reported 2 P.Wms. 720; 24 E.R. 930]

Evidence—Document—Presumption against person destroying or defacing.

B

A presumption will arise against a person who is proved to have destroyed or defaced documents and other articles sought to be put in evidence: post p. 227.

Executor—Debt owed to executor—Duty to claim without delay.

Per Sir Joseph Jekyll, M.R.: If there be a decree for an account to which an executor is party and the executor has a debt which he does not claim, but lies by and the account is taken, he shall not bring a new bill for his debt and so put the estate to unnecessary expense: post p. 221.

C

Will—Construction—Intention of testator—Prevalence over legal operation of words.

Per Sir Joseph Jekyll, M.R.: Where, in a will, the intention of the testator is plain his intent shall govern the matter and not the legal operation of the words in the will: post p. 224.

D

Administration of Estates—Equitable discretion—Effect of rules of law.

Per Sir Joseph Jekyll, M.R.: Where the law is clear courts of equity ought to follow it in their judgments concerning titles to equitable estates. Otherwise great uncertainty and confusion would ensue, and, though proceedings in equity are said to be secundum discretionem boni viri, yet when it is asked: Vir bonus est quis? the answer is, qui consulta patrum qui leges juraq; servat. The discretion is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to, the other: post p. 229.

E

Notes. Considered: *Burgess* v. *Wheate*, *A.-G.* v. *Wheate* (1759), 1 Eden, 177; *Buchanan* v. *Harrison* (1861), 1 John. & H. 662; *Bull* v. *Bull*, [1955] 1 All E.R. 253. Referred to: *Bagshaw* v. *Spencer* (1743), 2 Atk. 570; *Farr* v. *Newman* (1792), 4 Term Rep. 621; *Craufurd* v. *Hunter* (1798), 8 Term Rep. 13.

F

Cases referred to:

(1) *Collingwood* v. *Pace* (1664), 1 Vent. 413; O.Bridg. 410; 1 Sid. 193; 1 Lev. 59; 86 E.R. 262; 2 Digest (Repl.) 175, *53*.

G

(2) *Chudleigh's Case*, *Dillon* v. *Freine* (1594), 1 Co. Rep. 113 b; Poph. 70; 1 And. 309; 76 E.R. 261, Ex. Ch.; 38 Digest (Repl.) 849, *643*.

(3) *Brown's Case* (1581), 4 Co. Rep. 21 a; 76 E.R. 911; sub nom. *Anon.*, Moore, K.B. 125.

(4) *Brudnel's Case* (1592), 5 Co. Rep. 9 a; 77 E.R. 61; 38 Digest (Repl.) 797, *131*.

(5) *Auditor Curle's Case* (1610), 11 Co. Rep. 2 b; 77 E.R. 1147; 11 Digest (Repl.) 662, *859*.

H

(6) *Farington's Case* (1549], 1 Dyer, 67 a; 73 E.R. 141; 31 Digest (Repl.) 465, *5918*.

(7) *R. and Lord Hunsdon* v. *Countess of Arundel and Lord Howard* (1616), Hob. 109; 80 E.R. 258; 20 Digest (Repl.) 307, *483*.

(8) *Gartside* v. *Ratcliff* (1676) 1 Cas. in Ch. 292; 22 E.R. 807, L.C.; 20 Digest (Repl.) 307, *479*.

I

(9) *Hunt* v. *Matthews* (1686), 1 Vern. 408.

(10) *Wardour* v. *Berisford* (1687), 1 Vern. 452; 23 E.R. 579, L.C.; 22 Digest (Repl.) 176, *1604*.

(11) *Countess of Plymouth* v. *Bladon* (1687), 2 Vern. 32; 23 E.R. 630; 20 Digest (Repl.) 287, *297*.

(12) *Rooke's Case* (1598), 5 Co. Rep. 99 b; 77 E.R. 209; 41 Digest (Repl.) 65, *417*.

(13) *Burgess* v. *Wheate*, *A.-G.* v. *Wheate* (1759), 1 Eden, 177; 1 Wm. Bl. 123; 28 E.R. 652; 47 Digest (Repl.) 93, *665*.

Bill for administration of an estate under a will.

Robert Booth, a freeman of London, seised of a small real and possessed of a large personal estate, had only one child named Judith, who married in her father's lifetime William Cowper, afterwards Earl Cowper, and had issue by him one son named William. On July 5, 1690, Mr. Booth made his will, whereby, after making provision for his wife in lieu of what she might claim by the custom of London, he recited that he had before given his daughter £5,000 upon her marriage, which he did not intend to be in full of her orphanage part, and, therefore, made a further provision for her in these words:

> "I do further give and bequeath £4,500 unto Mr. Samuel Powell, upon this special trust and confidence that he shall, with all convenient speed, lay out the £4,500 in the best manner he can in the purchase of lands and tenements of inheritance to be conveyed and settled to him upon the several uses, intents and purposes hereinaftermentioned, that is to say, in trust for and to the use of my son and daughter William Cowper, Esq., and Judith his wife for the term of their lives, and after the decease of my daughter, then to the child or children of her body hereafter to be begotten share and share alike, and for want of such issue, then to my grandson William Cowper and his heirs for ever."

He further by his will charged some annuities upon a leasehold house he had in St. Helen's, London, gave several legacies, and devised the small real estate he had to his cousin Thomas Heirdson for life, with remainder over, and then gave all the residue of his estate not before disposed of to his daughter, desiring that what it should amount to over and above the £4,500 might be laid out with the £4,500 to the same end and for the same uses as are in the above recited clause expressed. He made Mr. Powell, his wife Mary Booth, and his daughter Judith Cowper, his executors. On Nov. 1, 1690, Mr. Booth died, and the three executors joined in the probate of the will, but Mr. Cowper (in right of his wife) acted as executor and possessed the personal estate.

On June 16, 1692, Lord Cowper (then William Cowper) executed a declaration of trust whereby, after reciting the will and that he in right of his wife (the heir and residuary legatee of Mr. Booth) had received Mr. Booth's personal estate (including a mortgage then unpaid on lands in Gloucestershire), assets above all debts and legacies sufficient to answer the £4,500, and that he had lately purchased an estate at Standon in Hertfordshire for £3,400, he declared that that estate was bought by him with the money arising out of Mr. Booth's personal estate and was to be taken as part of the £4,500, and that he had taken a conveyance to himself to the intent, that as soon as the whole purchase for the said £4,500 could be completed, he and his heirs would settle and convey the same according to the true intent of the will, or as near as might be at the time of such settlement, and that in the meantime the rents and profits should be received by such persons respectively, as would in right and justice be entitled thereto, in case such conveyance were made. On July 5, 1697, Lord Cowper executed a declaration of trust of three-fifths of other lands purchased by him wherein, taking notice that he had deposited the former declaration of trust in the hands of Mr. Powell, he declared the trust of the three-fifths of those lands in the same manner as he had declared that of the other lands, and, having sold part of the other lands, he declared that the three-fifths of those lands with the lands unsold of the first purchase, did exceed the value of £4,500 as they did. This declaration was also deposited with Mr. Powell, and both were found among his papers, as appears by the answers of his executors. In 1697 or 1698 William Cowper the son died an infant of tender years, and in April, 1705, died Judith, the mother.

On Nov. 6, 1722, Lord Cowper made his will, and after subjecting his real and personal estate to divers charges, and to debts and legacies, he devised his real

estate to the defendant, the present earl, for life, remainder to his executors as trustees to preserve contingent remainders, remainder to the defendant's first and other sons in tail male successively, and several like remainders to Spencer Cowper his youngest son, and every other son to be begotten, for life, and their first and every other son successively in tail male. He then limited a remainder to his brother Spencer Cowper for life, remainder to the plaintiffs William, John and Ashley Cowper and every after-born son of his brother Spencer Cowper for life, and to their first and every other sons successively in tail male, with proper limitations to trustees to preserve contingent remainders, remainder to the right heirs of the earl. By a codicil of the same date with the will he bequeathed the residue of his personal estate to his executors, in trust to be laid out in the purchase of lands to be settled to the same uses as he before had devised his real estate, and so as they, and all the lands he was then seised of, might go with the honour, and made his brother Spencer Cowper and the defendant Woodford his executors.

On Oct. 10, 1723, Lord Cowper died, soon after which both the executors proved the will, and on Nov. 16 following, they filed their bill against the new Earl Cowper, the late countess, Lady Sarah, Lady Anne and Spencer Cowper (the late earl's younger children), and against William, John and Ashley Cowper, three of the plaintiffs in this cause, in which, Lord Cowper's will being recited verbatim, it was alleged that the plaintiffs were unwilling to meddle with any of the estate except what was of absolute necessity for the funeral and other immediate occasions, but, it being necessary to take some money for those purposes, the plaintiff Spencer Cowper, on Oct. 15, 1723, in the presence of Mr. Woodford and Mr. Sydenham (the late earl's steward) took out of an escritoire in the earl's house £1,670 in bank-bills. On Oct. 20 the plaintiffs went to Colne Green, the earl's house in the country, and in Mr. Sydenham's presence, opened a bureau of the earl's, took thereout £187 12s. 6½d. which was paid to the countess. All the rest of the earl's personal estate remained in the same condition as it was at his death. It being necessary to prove the will per testes, and the plaintiffs being unwilling to execute the trusts thereof without the direction of the court, the bill prayed that the defendants might set out their claims on the real and personal estates of the earl, that the legatees might be paid, and an allowance settled for the maintenance of the present earl, and his other children, that the surplus rents and profits of the whole estate might be disposed of for the earl's benefit, a receiver appointed, the will and codicil proved and established, and the trusts thereof completely executed. On Dec. 21, 1723, the earl, then an infant, answered this bill, and insisted on his being heir-at-law and entitled to the late earl's real estate in case the will was not well proved. On Mar. 13 following, William, John and Ashley Cowper answered, and admitted the will and codicil, hoping the trusts should be fully executed and that the remainders limited to them would be decreed.

On the same day the earl, by his next friend, filed a cross-bill against Mr. Spencer Cowper and Mr. Woodford, and against his brother and sisters, praying that the defendants might set forth their several claims and demands of what kind or nature soever upon the real and personal estates of the late earl, and might account for them, and that, if the will was duly executed, an execution of the trusts might be decreed according thereto. Mr. Spencer Cowper put in his answer the day the bill was filed, and thereby gave the same account as by the original bill of the taking £187 12s. 6½d. out of a bureau at Colne Green on Oct. 20, in the presence of Mr. Woodford and Mr. Sydenham, and that besides that and £1,670 5s. taken out of the house in George Street, and some other particulars set forth in his answer, he had never received any part of the personal estate or meddled therewith; that he had caused an iron chest to be opened in the presence of Mr. Woodford and Mr. Sydenham, in which were securities, moneys and other things, which chest was locked again with three keys, whereof each of them kept one, that the chest was deposited with him, and remained in the same condition, ready to be delivered as the court should direct; that he believed there might be some few things in an escritoire or chest at Colne Green, whereof he had the key, but

knew not the particulars, and desired it might be brought up and delivered as the court should direct, he not intending to intermeddle therewith; that he had no further or otherwise concerned himself with the personal estate, having determined to act as little as possible without the direction of the court; that he could not set out an account of the late earl's real estate, but referred to Mr. Sydenham for that purpose and said he was very desirous the trusts of the will should be fully executed, an account taken of the real and personal estate, and the surplus laid out in a purchase, as the will directed, after funeral charges, debts, legacies, and all just demands thereout deducted and paid, in order to which he set out Mr. Booth's will, and stated his claims under it in the same manner as before mentioned, and as was done by the present bill, insisting that his title to the benefit of the trust in Mr. Booth's will accrued from the death of Judith the late earl's first wife; that he believed the late earl possessed the real and personal estates of Mr. Booth and that the trust had not been fully executed; and, therefore, he insisted

> "that he was entitled to the real estate of Mr. Booth undevised, and to the sum of £4,500 and interest, or to any estate purchased therewith, and to an account of the surplus of Mr. Booth's personal estate, with interest from the death of the said Judith; but that he conceived it might be proper by a bill to be preferred by him against Mr. Booth's surviving executors and other proper parties, to establish his demand, though he found it necessary to disclose it by way of answer to this bill, which was to discover what demands the defendants had on the late earl's estate; and, therefore, craved leave to reserve to himself the liberty of proceeding to establish his demand as he should be advised, and saving to himself such his demand, as far as the same should appear just and reasonable, he submitted to the execution of the trusts of my Lord Cowper's will."

Mr. Woodford likewise put in his answer, and said that he came to Colne Green on Oct. 13, the Sunday after the earl's death, and, with the concurrence of the countess, Mr. Cowper, the present earl, and Lady Sarah, settled and agreed on the manner and charges of the funeral, but took no other notice of what passed there at that time; that on Oct. 15 he attended Mr. Spencer Cowper, his co-executor, at George Street where, finding several papers, writings, letters, and accounts, many of which were cursorily passed over by them in the presence of Mr. Sydenham, some few principally concerning the testator personally and of no concern or value to his estate, were, as he believed, taken away by Mr. Cowper, and in all other respects gave the same account of this transaction in George Street, as was given in the original bill, and in Mr. Cowper's answer, saying that the iron chest was removed to Mr. Cowper's chambers; that, among other things at the house at Colne Green, the earl had a bureau or cabinet in which were (as he believed) £187 12s. 6d. in money, which being on or about Oct. 20 taken from thence, were delivered to Mr. Sydenham, and by him (as he believed) paid on account to the countess. The day before either of these answers put in, Mr. Spencer Cowper filed a bill against the present earl, Mr. Woodford, and the surviving executor of Mr. Booth, and others, to establish his demand.

In May, 1724, the present earl was served with the Lord Chancellor's letter and appeared, but was never called upon for an answer. None of the other defendants was served, nor any other proceedings had upon this bill. In the other two causes replications were filed to all the answers, and on July 10, 1724, both causes were heard together, when the late earl's will and codicil were declared to be well proved, and decreed to be performed, to which end an account of the personal, and of the rents and profits of the real, estate was directed, the Master to take an account of the testator's debts and legacies; whom the creditors should attend to make out their debts; that the surplus of the personal estate should be laid out in purchases according to the earl's will, and the surplus profits of the real estate improved for the present earl's benefit.

In pursuance of this decree, on Jan. 18, 1726, the Master, having been attended by solicitors for the plaintiffs and defendants, made a general report of the personal estate which then stood in the name of the late earl or of his executors, or which had been received by Mr. Sydenham, who, before the hearing, had by order of the court been appointed receiver of the rents and profits of the real, and of the produce of the personal, estate, in which report the leasehold estate at St. Helen's, and the rent of it due at the earl's death, were accounted for as personal estate, as were also the arrears of rent of the estate in Hertfordshire concerning which the trusts had been declared by the earl. Also a bond and note entered into by Mr. Booth, were mentioned as outstanding debts due to the earl and as part of his personal estate. On July 28, 1727, the Master, having been attended by solicitors for the plaintiffs and the defendants, as also by the receiver, made another report of his having passed the receiver's accounts of the rents and profits of the real, and of the interest and produce of the personal estate from the earl's death, to Michaelmas, 1726. These accounts comprised the rents of the estate in Westmorland, of the house in London and of the estate in Hertfordshire, and also the interest of the savings of the late earl's estate which had been from time to time invested in securities for the new earl's benefit according to the decree.

On April 10, 1728, the Master made another report of his having passed the receiver's accounts until Michaelmas, 1727, and the succeeding accounts after Mr. Spencer Cowper's death were passed in the same manner until the present earl came to age. None of the reports was confirmed, nor was it usual to confirm reports of receivers' accounts, as all except the first were, and as to that, although it is not confirmed in common form, yet the following orders obtained at the instance of Mr. Cowper and Mr. Woodford were, as His Lordship considered, an implicit confirmation of it, for on Nov. 12, 1724, an order was made on their motion that several sums, part of the earl's estate, then out upon securities, and expected to be paid in, should be placed out in South Sea annuities in their names. On June 22, 1727, there was an order upon their petition to sell the stocks of which the earl's personal estate then consisted and lay out the moneys arising from such sale in purchases. On Mar. 8, 1727, they preferred another petition, reciting the decree, the report of the receivers' accounts, and that they were desirous to improve the savings of the new earl's estates, and had agreed to place out £10,000 on a mortgage, which sum was to be advanced out of the clear produce of the real and personal estate of the earl; that the receiver had, with their approbation, paid £7,000 in part, and would soon have £3,000 more in hand; and that, the decree having only provided for placing out the surplus profits of the real estate, they apprehended it necessary to have an order for placing out and improving the clear produce of the personal estate in the same manner. They, therefore, prayed that the receiver might pay the £3,000 and that the mortgage might be made to them in trust for the earl, and such further sums as from time to time should be saved for the earl out of the personal as well as real estates be placed out at interest and improved for the benefit of the earl in their names. On Mar. 13, 1727, this petition was heard in the presence of counsel for the petitioners and the earl, when it was referred to the Master to see if the security proposed was a good one, and, if so, the receiver was to pay the £3,000 and the mortgage to be made to the petitioners in trust for the earl. The future savings of the personal estate were ordered to be improved for the earl's benefit in their names.

This order was executed on July 17, 1728, the Master having been attended by solicitors for the plaintiffs and the defendants, certified his approbation of the title and security, and on Nov. 11, 1728, approved the mortgage deeds made to the plaintiffs by the description of trustees on behalf of the earl. The money was paid and the mortgage deed executed by Mr. Woodford only after Mr. Cowper's death, and in pursuance of an order for that purpose, the mortgage was assigned to the new earl on his coming to age.

During all these proceedings, Mr. Cowper never made any step towards proving his claim or demand or coming in as a creditor under this decree, but he suffered

the rents of all the estates now claimed to be accounted for as Lord Cowper's, and on Dec. 10, 1728, died. The plaintiff William was his eldest son and heir, and as such heir-at-law of William Cowper, the son of Lord Cowper, by his first wife. The plaintiff Theodora Cowper was Spencer Cowper's widow and administratrix, and the plaintiffs John and Ashley Cowper and Judith Madan were his younger children who had brought this bill (mutatis mutandis the same as Spencer Cowper's) to have an account of Mr. Booth's personal estate not invested in purchases, of the rents and profits of the estates in Hertfordshire and Westmoreland, and of the house in London, to have a conveyance to the plaintiff William Cowper of the estates in Hertfordshire and Westmoreland, and an assignment to him of the term in the house in London. The defendants all answered, but none of them was concerned in interest except the defendant, the new earl.

The estate in Westmoreland was a mortgage, and the house in London a leasehold for years; they were, therefore, both part of the personal estate of Mr. Booth and to be governed by his will. The rents and profits thereof were received by Lord Cowper during his life, and after his death were brought into the receiver's accounts as part of his Lordship's estate.

SIR JOSEPH JEKYLL, M.R.—As to any account of the personal estate of Mr. Booth received by Lord Cowper and not invested in purchases, or of the rents and profits of the Hertfordshire and London estates received by his lordship, or of those received after his death, and brought into the account taken in this court pursuant to the decree before mentioned, I am of opinion that the bill ought to be dismissed, and as to all the personal estate of Mr. Booth, possessed by Lord Cowper, no part whereof was possessed by Mr. Booth or Mr. Powell, the bill must be likewise dismissed as against their representatives. This will be a dismission of the whole bill as to all the plaintiffs, except Mr. William Cowper, and even with respect to him, as he is jointly concerned with the other plaintiffs in the personal estate of Mr. Spencer Cowper.

First, as to any account of the personal estate of Mr. Booth received by Lord Cowper and not invested in purchases, or as to the rents and profits of the Hertfordshire, Westmoreland and London estates received by Lord Cowper, the plaintiffs claim as representatives and next-of-kin of Mr. Cowper, and, if he was entitled, then was he a creditor of Lord Cowper, and ought to have come in upon the foot of the decree made in the causes before mentioned. Lord Cowper by his will had charged all his estate real and personal with the payment of his debts, and by the decree Spencer Cowper, as well as his co-executor Mr. Woodford, was to account for the personal and the rents and profits of the real estates, the creditors were to come in and prove their debts, and the surplus only was to be laid out in purchases pursuant to his lordship's will. Spencer Cowper, therefore, might have craved an allowance in the account of his demand, or, if not, might have come in as a creditor by the express provision of the decree, and one way or other (I conceive) he ought to have come in, for he had disclosed his demand by his answer to the cross-bill, was party to the decree, and to the account taken pursuant thereto. In such case, I declare, I shall always be of opinion that an executor or trustee ought not to lie by, and put the estate with which he is entrusted to the expense of a new suit to obtain satisfaction for a demand which he might have had in the course of the former proceedings. This is not acting agreeable to his trust.

Secondly, as to the account of the rents and profits of the estates received after the death of Lord Cowper and brought into the account before mentioned, Spencer Cowper was party to that account and bound by it, and the plaintiffs who stand in his place cannot avoid that bar by an original bill, no nor by a bill to establish it, although he did not think fit to prosecute it, so that, as to this account likewise, there must be a dismission as being finally barred.

The great question then in this case concerns the Hertfordshire estate principally, which the sole plaintiff now remaining (William Cowper) claims, as cousin and heir of William Cowper the late earl's son by his first wife. With regard to

that, the declarations of trust executed by Lord Cowper take notice of Mr. Booth's will and declare that these lands were purchased with £4,500, being money arising out of Mr. Booth's personal estate, and were to be conveyed and settled to the uses of Mr. Booth's will, and in the meantime that the rents and profits ought to be received by the persons entitled as if such settlement had been made. These declarations being relative to the will of Mr. Booth, if Spencer Cowper as uncle and heir of William Cowper became entitled by or under that will, it is the same as if the trust had been expressly declared for him, and then undoubtedly he had an equitable estate vested in him which hath descended to the plaintiff; and so is his title.

It has been objected that, although Spencer Cowper was heir to his nephew William, yet he was not next-of-kin, and if the £4,500 had remained in money, Lord Cowper would have had it and after him the present Lord Cowper according to his father's will. But this objection is of no weight, for had the £4,500 remained in specie, it must have been considered as land and have been governed by Mr. Booth's will. It is impossible for the father to be heir immediately to the son. Nay, the law says that the land shall rather escheat, for which reason it must have descended to Spencer Cowper, else it could not have descended at all.

As to the hardship of setting up this right in respect to the person against whom the suit was brought, I own, and cannot forbear declaring, that were I to consider the matter, not as sitting in judicature, but taking in all manner of considerations, such as honour, gratitude, private conscience, etc., I must think this claim should never have been made. The defendant is son and heir of Lord Cowper, in consequence of whose marriage with his first wife the subject-matter of the plaintiff's as well as his father's claim has arisen. Their obligations to Lord Cowper laid upon them in his lifetime could not but be very great, and his kindness continued to the last, for by his will they and their issue are put into the entail of the estate, to go along with the honour, which by his patent is limited to them. The defendant now sustains that honour, and everyone would wish the whole estate to go along with it. Besides, as Sir Matthew Hale said, in *Collingwood* v. *Pace* (1) (Vent. 424), the brother of the half-blood is nearer than the uncle, and is, therefore, preferred in the administration, for the uncle on the part of the father has no more blood of the mother than the brother of the second venter, and he has the immediate blood of the father which the uncle has not. The uncle is forced to go up to the grandfather and meet the blood of the nephew in him, so that it is impossible to find out a reason in nature for preferring the uncle to the half-brother. Indeed, he offers a legal reason for it, which is that our law, agreeing with the canon law, makes brother and brother but one degree and uncle and nephew two degrees, and thereby the law gives a mediate descent to the uncle mediante patre, but the descent to the brother must be immediate, if at all. Sir Matthew Hale holds that the half-blood impedes it, but let us examine this. Our law taking the computation of degrees of kindred from the canon law (which, by the way, shortened the degrees or distance of relation in order to increase the number of dispensations from the court of Rome) makes brother and brother but one degree, whereas the civil law, in its computation, went up to the common parent or father and down again to the persona proposita, and so made brother and brother two degrees, which is certainly right, for there is no consanguinity among collaterals, but by meeting of the blood in some common person or parent. Taking our law to be right, why should the half-blood impede the descent to the heir on the part of the father, why should the blood of a different mother hinder the descent to the heir of the father, especially when it is considered that neither of the competitors has any of the mother's blood, as has been observed? These seem considerations of weight, but still, sitting in a legal judicature, I must judge of the plaintiff's claim as the law is, and not as I would have it. The court must judge according to the stated rules of law and equity, and if the plaintiff's claim is not barred, nothing is plainer than his title. The law, if it had been a legal title, would undoubtedly have cast the descent upon his father, who by the declaration of trust had an equitable title.

Now equitable and legal estates are descendible in the same course. Uses before the Statute of Uses, 1535, were equitable estates, but yet the common law directed their descents. Particularly there was a possessio fratris of an use as well as of a legal inheritance: *Chudleigh's Case* (2) (1 Co. Rep. at p. 121 b); *Brown's Case* (3) (4 Co. Rep. at p. 22 a), which cite the Year Book of 5 Edw. 4, 7 b, so that the brother of the half-blood was, in that case, excluded from the inheritance of an equitable as well as of a legal estate.

Sir Edward Coke, C.J., somewhere sets a value upon the laws of England in relation to descents on account of the certainty of them, but, considering how many trusts are nowadays created in lands, and how many questions have arisen concerning uses, whether executed or not, I think we should have little reason to boast of the certainty of our laws in the rules of descent, if legal estates were governed by one rule and equitable by another. Besides, as Lord Cowper thought proper to take the conveyance of the land in question to himself, let us now suppose he had lodged the legal estate in another person. Could the present earl have had the conveyance of the inheritance from that trustee? Plainly he could not. Now, if the plaintiff as heir and not the defendant as brother of the half-blood must under such circumstances have been entitled to a conveyance, surely Lord Cowper's vesting the legal estate in himself can make no alteration in the case.

The next question to be considered, supposing these objections not to stand in the plaintiff's way, as plainly they do not, is whether anything else is sufficient to bar his demands. With regard to the proof of Lord Cowper's keeping his accounts of these estates jointly, and in the same manner with his other estates, of his letting leases of them, having them measured and mapped, and of Spencer Cowper's saying that the late earl had declared to him just before his death that he did not owe above above £100 and that there was not a more punctual and just man in the world than he, these proofs to me seem not material, for certainly Lord Cowper thought the lands in question his own during his life. His enjoyment of them is a sufficient evidence of that, and it does not appear Mr. Cowper knew of this claim when he said these things. The objections made against the plaintiff's claim (such I mean as seem of any weight) are these. First, the length of time since the title accrued, which was from the death of Lord Cowper's first wife in reversion, if not in possession. Secondly, the improbability of Lord Cowper's suffering his brother's title to stand out, when he might have obtained a release or conveyance of it. Thirdly, the tender or slight manner in which the plaintiff's father mentioned his claim in his answer to the defendant's bill, and to Mr. Sydenham, the late earl's steward, a little before his death. Fourthly, his not prosecuting his bill to make good that claim, but, on the contrary, suffering a procedure whereto he was party to go on, and the rents of the lands in question to be accounted for as part of the late earl's estate. Fifthly, his not coming in as a creditor for the residuum of Mr. Booth's personal estate possessed by the late earl, though as such, he was invited or directed by the decree. But above all, sixthly, his possessing himself of the late earl's papers, writings, and books of account after his death, without the participation of his co-executor Mr. Woodford, burning and destroying such as he thought fit. These things most certainly give an unfavourable aspect to the plaintiff's claim, however go not so far as to bar it.

The case being not of an accidental loss, or suppression of a deed, two things are necessary for the defendants to prove—(i) that Spencer Cowper did execute some deed or writing whereby the estate was conveyed or released to the earl; (ii) that such deed was destroyed or suppressed by him. It must be granted that, the plaintiff's father having an equitable estate, if he is divested of that, it must be by some deed or writing sufficent for that purpose. This is supposed by the defendant's making the plaintiff's father's burning or destroying papers or writings a part of his defence; and, therefore, a presumption of satisfaction made by Lord Cowper for this claim, is not (as was said by some of the defendant's counsel) of itself sufficient, but there must have been some deed or

writing to convey or release the estate or that will operate as such. It does not sufficiently appear, nor can it be inferred or presumed, that there was such a deed or writing, or that it was destroyed or suppressed by Mr. Cowper.

As to the first objection, the length of time since the title accrued, which was on the death of Lord Cowper's wife, in reversion if not in possession, Spencer Cowper in his bill and the plaintiffs in theirs suppose the title commenced then in possession, and demand an account accordingly, but the plaintiffs at the hearing abridged their demands, praying an account only from the death of Lord Cowper, which in this case ought to be inserted in the decretal order, and will bind the plaintiffs who (particularly William Cowper) cannot say hereafter that their father's title accrued in possession before the death of Lord Cowper, but the defendant's counsel, in order to lengthen the laches of the plaintiff's father, may, by way of argument, still insist, as they have hitherto done, that it did accrue in possession on the death of Lord Cowper's first wife. The first limitation is to William Cowper and Judith his wife for the term of their natural lives. This undoubtedly would carry an estate for both their lives, during the life of the survivor, and according to *Brudnel's Case* (4), which has been always taken for law, unless the next words "and after the decease of Judith, then to the child or children" restrain and make them carry only an estate during the joint lives of Lord (then Mr.) Cowper and his lady. Indeed, if the latter words are not so taken, they must be totally rejected, and the subsequent limitations made to take place, not upon the death of Mrs. Cowper according to the will, but to expect until the death of both, whereas on the contrary, if they are so taken, they may receive a construction, and be understood to vest the remainder in Mrs. Cowper, upon the determination of the former estate by the death of her husband. I am of opinion that this is the true way of construing Mr. Booth's will, it being certain that the literal and grammatical construction of a limitation to A. and B. for the term of their lives is for the term of both their lives, for "their lives," being plural, must comprehend both and join them together, which is the legal construction too where there is no particular reason to vary from it, for so it is held in *Auditor Curle's Case* (5), that an office granted to two pro termino vitarum suarum, determines by the death of one. Indeed, in a limitation of lands it is otherwise, and the reason of the difference is this. A joint tenancy of lands may be severed, and, if it is not, the interest must consequently survive, which is otherwise in an office, and that it is so in lands is not from the import of the words of that limitation, but from the institution or operation of law, for, if the words imported a survivorship, it would be so in both cases. Besides, on a severance of the joint tenancy in land, the estate does not continue during the life of each donee, but determines upon the death of one for his moiety and of the other for his, according to Dyer 67 a [*Farington's Case* (6)] and 1 Inst. 197 a, which shows that the estate does not necessarily survive or continue for the whole as long as one of them lives. This different operation of the same words in the cases put shows the intent of the donor, and consequently determines the effects of it. So, in our case, the words subsequent to the limitation, "and after the decease of my daughter to the child or children, etc.," show the testator's intent, and must determine the effects of the limitation, especially in a will, where the intent overrules the legal import of the words, be they never so express and determinate.

I am sensible that there is a diversity of opinion among the learned judges of the present time, whether the legal operation of words in a will or the intent of the testator shall govern. For my part, I shall always contend for the intention where it is plain, and I think the strongest authorities are on that side, for, if the intention is sometimes to govern as it is admitted it must and not always give way to the legal construction, and yet at other times shall not govern, there will then be no rule to judge by, nor will any lawyer known how to advise his client, a mischief which judges ought to prevent.

Thus much I have thought proper to say upon the question whether the remainder came into possession upon the death of Mrs. Cowper, or not until the

death of her husband (afterwards Lord Cowper), because it was laboured so much at the Bar, and I did not care to pass it over superficially, but I think it not very material. If Spencer Cowper had any knowledge of his title before Lord Cowper's death, it might have been material by lengthening the time of his laches, but there is no proof of that, and Mr. Woodford by his answer says that Oct. 15, 1723 (five days after the earl's death), was the first time Mr. Cowper mentioned his demand under Mr. Booth's will, which Mr. Woodford says he never heard of before, nor is there ground to believe that Mr. Cowper knew anything of it until after Lord Cowper's death. He had no reason to think himself concerned in Mr. Booth's estate, being a stranger to him in blood. Besides, if it had occurred to him that he was heir to Mr. Booth's grandson, yet Mr. Booth was a citizen of London, had preferred his daughter in marriage, his estate almost all personal, how then could Mr. Cowper divine he would order it to be converted into land, and afterwards dispose of it in such a manner as to carry it from his own heirs, and give it him?

As for the declarations of trust wherein Mr. Booth's will is recited, how should Mr. Cowper know of them? They were deposited by Lord Cowper with Mr. Powell the executor, and found after his death among his papers, as his executors say by their answer, which is not contradicted by proof. Besides, one of these declarations takes notice that the other was deposited with Mr. Powell, and there being the same reason to deposit the one as the other, no doubt they were both so, and in Mr. Powell's custody at the time of his death, so that there is no reason to suppose Spencer Cowper knew anything of his title until after Lord Cowper's death.

Then they object the improbability of Lord Cowper's suffering his title to stand out when he might have obtained a release or conveyance of it. As to this, I am in the dark with respect to Lord Cowper's knowledge of Mr. Cowper's title. One would think he had considered the limitations in the will, and, consequently, to whom the estate would go after his death, but that his lordship was positive in his opinion, upon limitations, so ambiguous, does not appear, and is the more doubtful as in neither of the declarations of trust executed by him did he take upon himself to determine how the estate was to go by virtue of the limitations. All that he says is that it should go according to the true intent of Mr. Booth's will. What power or influence Lord Cowper had does not judicially appear. If he did obtain a release or conveyance from Mr. Cowper, it must be either before he had issue by his second lady or after. Before Lord Cowper had such issue Mr. Cowper was both heir to Lord Cowper and to his son, and, therefore, Lord Cowper, in case his son by his first marriage should die without issue, might think that the estate would go to his brother and that he had no reason to endeavour to prevent it. It is proved that Lord Cowper's son died in 1697 or 1698, his first lady not until April, 1705, and until issue born of the second marriage there is no foundation to presume there was any such release or conveyance, and after he had issue by his second lady, he might think his brother would not do so hard a thing as to call for the legal estate and separate it from the honour, an honour entailed upon himself and his issue. Besides, there is some evidence that this title was standing out on Lord Cowper's death. His lordship deposited these declarations of trust with Mr. Powell, to be delivered to such as should have a right to the estate, and, if he had got in his brother's title, most probably he would have called for the declarations, and not have left them in the hands of Mr. Booth's executor, when he himself was sole owner of the estate.

The third objection is the slight and tender manner in which the plaintiff's father (Spencer Cowper) mentioned his claim in his answer to the defendant's bill, and to Mr. Sydenham, the late earl's steward, a little before his death. Mr. Cowper in his answer says:

> "he is desirous the trusts of the late earl's will should be executed, and insists upon his title to the benefit of the trusts therein contained, but says, he conceives it might be proper by a bill to establish his demand, though he found it necessary to disclose it by way of answer to that bill, and prays to reserve

to himself the liberty of establishing his demand, as he should be advised, and saving it to himself, so far as the same should appear just and reasonable, he submits to the execution of the trust of my Lord Cowper's will."

Mr. Sydenham, examined for the defendant, says:

"a little before Mr. Cowper's death, he took occasion to mention this demand of his upon the earl's estate, and told him he hoped he would make an end of it in the easiest manner he could, upon which he seemed to make very slight of it and said there was a small piece of meadow near his canal in a field called Clunkfield, which lay convenient for him, and if the present earl would let him have this field, he should make other matters extremely easy."

It seems plain that Spencer Cowper's answer to the bill expresses a backwardness in setting up this title and a tenderness in making the claim, and by what he said to Mr. Sydenham he slighted and made little account of it (which claimants are not apt to do), yet there is something particular in this case which takes away the force of the objection, for although the title upon which this claim is founded is clear and plain to those that understand the law and common rules of equity, yet in the common opinion of mankind, it would be thought in itself, and in the circumstances attending it, very hard and unreasonable, and the setting it up severely censured. Besides, it appears by Mr. Sydenham's deposition that this claim was not set up in order to carry things to the utmost extent, but to obtain some acknowledgment for a release of the demand, and, indeed, it was like to have had that effect, for Mr. Sydenham says further in his deposition that the defendant, after he came to age and before the filing of the present bill, offered the present plaintiff to comply with the proposal his father had made, and to convey the field, upon having a release.

The fourth objection is that of Spencer Cowper's not prosecuting his bill brought to make good his claim, but on the contrary suffering the proceedings I have mentioned, and the rents of the lands claimed by him to be accounted for as part of the late earl's estate. So far as that proceeding extends, it has proved a bar, but further than that it cannot be carried, for it cannot operate as a bar to the realty or as an extinguishment of the right to the land. It is objected that, if Spencer Cowper had thought his claim to the land had subsisted, he would not have suffered a bar to an account of the rents and profits to have run upon him. To this it may be answered that possibly Mr. Cowper might think the pendency of his bill to establish his claim would prevent that bar, but, if he did not think so, yet he might be willing to suffer himself to be barred as to the mesne profits, or might intend no more by setting up his claim than to obtain some acknowledgment for the release of it, especially as he must know that the setting it up would appear hard and could not escape censure, which seems also an answer to the next objection to the plaintiff's claim, Spencer Cowper's not coming in as a creditor for the residuum of Mr. Booth's personal estate possessed by the late earl, though he was, as such, invited and directed by the decree. Besides, he might not think it proper, or worth his while to enter into so stale an account, as that of Mr. Booth's estate who died almost forty years before.

Now we come to the last objection (which is the strongest), viz., Spencer Cowper's possessing himself of the late earl's papers and books of account after his death without the participation of Mr. Woodford, his co-executor, and burning and destroying such of them as he thought fit. This is a fact of such a nature that every circumstance relating to it ought to be thoroughly weighed in order to see whether there be any foundation in precedent, reason or justice, for the presumptions which the defendant's counsel would build upon it, and this, not merely with regard to the present cause, but as it concerns property in general and public justice.

The evidence of Mr. Cowper's possessing himself of all the earl's papers, those at Colne Green, his house in the country, and those at his house in town in George Street, is very plain. The sum or substance of it is this. (i) As to the

papers and books of account in the country, notwithstanding there is some variety in the evidence as to the circumstantial part, yet it plainly appears that on Oct. 10, 1723 (the day Lord Cowper died) Spencer Cowper was in the house at Colne Green and, none being present but Mr. Sydenham, he opened a bureau, took out papers, cancelled some, and afterwards on the same day Mr. Sydenham found him alone with a greater quantity of papers and writings lying before him on the floor, torn and cancelled, which he told Mr. Sydenham "he intended to put out of the way, and would look over all the earl's papers, to preserve such as he thought proper, and destroy the rest." On Oct. 13 Mr. Woodford, by his appointment, was come down to Colne Green, and before he came, Mr. Cowper ordered one of Lord Cowper's servants to carry down a large basket of papers and writings into the kitchen to be burnt, and, accordingly, they were burnt in the kitchen fire in the presence of several of the common servants, one of which says he saw on the top of the basket two books covered with white vellum or parchment, such as Lord Cowper used to keep his accounts in. (ii) As to the papers or writings in town, it appears that on Oct. 15 Mr. Cowper, Mr. Woodford and Mr. Sydenham, came to Lord Cowper's house in George Street, and in a closet below stairs there was a bureau which, by a key Mr. Cowper had in his pocket, was opened, and in it were several writings and papers, some of which Mr. Cowper only looked over and took away with him, saying that they concerned the earl personally and not his estate, and locked up the closet, keeping the key, and that they all went up and opened an iron chest, put in some jewels and curiosities which they had found below, and took out some bank-bills, which were delivered to Mr. Sydenham. Then three locks were put upon the chest and each had a key. A day or two after this, Mr. Cowper told Mr. Sydenham he would have all the earl's papers and writings in town brought to his chambers that he might peruse them, and put out of the way such as were not proper to be kept, and, accordingly, without Mr. Woodford's knowledge, he sent the key of the closet to Mr. Sydenham, who caused the papers to be taken out of the bureau and put in boxes, which boxes together with the iron chest, were sent to Mr. Cowper's chambers, who several times after mentioned to Mr. Sydenham that he had looked into the late earl's papers and destroyed such as were not fit to be seen. It appears, likewise, that applications were made to Mr. Cowper, on behalf of the countess, desiring that she or some person for her might be present at the opening of the earl's papers, which he declined, saying that they were private papers not fit to be seen.

Upon this evidence and the known maxim omnia præsumuntur in odium spoliatoris the defendant's counsel would have two presumptions to arise: (i) that Spencer Cowper had executed some deed or writing to the late earl, whereby his title to the lands in question was conveyed or released; (ii) that such deed or writing was by him burnt or destroyed.

Before I consider the evidence, I must premise, that this is going further than any court, either of law or equity, has gone in any case of suppressing or destroying evidence, that I know of. In *R. and Hunsdon* v. *Arundel and Lord Howard* (7), Hobart, C.J., says that the suit (that is the bill) affirmed the King's title to be by the attainder of Francis Dacres, who (the bill said) was seised of an estate tail, but the deeds whereby the estate was come to him were not extant, but were very vehemently suspected to have been suppressed and withheld by some under whom the defendants claimed. Therefore, the decree ran:

> "that the King and his heirs, and the Lord Hunsdon, his farmer, should hold and enjoy the lands, until the defendants should produce the deeds, and the court thereupon take further consideration and order."

This was a very solemn resolution, and with the greatest deliberation, for the then Lord Chancellor [Lord Ellesmere] was assisted by the two Chief Justices and the Master of the Rolls. By the printed report the deeds are supposed but not "said" to be proved. I have had the Register's Books searched. The decree is entered Trinity 14 Jac. 1, lib. B., fol. 1095 b., and drawn up thus:

"that the King, his heirs and his farmer, should hold and enjoy until the defendant produced the deeds therein particularly mentioned and proved once to have been extant and duly executed."

Here we see that the existence of the deeds was fundamental to the decree, and the proof of them fully and expressly asserted by the court in framing the decree. In *Gartside* v. *Ratcliff* (8), the deed burnt or cancelled was proved. In *Hunt* v. *Matthews* (9) (1 Vern. 408), the deed suppressed was proved, and in *Wardour* v. *Berisford* (10) (not rightly reported, 1 Vern. 452) in the Register's Book of Paschæ 1687, p. 491, there is this entry:

"The Lord Chancellor, on reading and examining witness viva voce, declared that the papers (there called Wynne's accounts) were, through the carelessness of the defendant, embezzled, and, therefore, confirmed the Master's report, which had not made the defendant any allowance for diet, etc., by reason of such embezzlement."

Here the proofs of the embezzlement of the papers prove there were such papers. *Countess of Plymouth* v. *Bladon* (11), reported 2 Vern. 32, appears by the Register's Books to be thus. The defendant was the plaintiff's steward, and the bill was brought for an account. The defendant pleaded that the plaintiff had imprisoned him, and upon promise of his liberty had got a trunk, in which were all his vouchers, insisting that, though he kept the key, yet it was easy to be opened, and that it was to be presumed that it had been so and it was impossible for him to prove what the plaintiff had taken out, or to account without his vouchers. This plea was argued and ordered to stand for an answer. Afterwards, by an interlocutory order, the trunk was directed to be delivered to the usher of the court, and upon hearing of the cause, the Lords Commissioners decreed the defendant to account, and ordered the trunk to be brought before the Master, who was to open it in the presence of both parties, they to have copies of the papers found in it, as they should think fit. In this case the court would not presume material papers, or even a suppression of any such, though it would seem that the trunk was got by the plaintiff in a very unwarrantable manner, and only took the best care they could that the papers, whatever they were, should be produced.

There have been no cases at law, and these are all the material ones that I have heard cited in equity, but though there may have been others, the names of which I cannot at present recollect, yet do I not remember or believe that there has been any one where there was not some proof made of the existence of the deed or writing supposed to be suppressed or destroyed.

Now I will consider the manner and circumstances of Mr. Cowper's possessing himself of and burning and destroying these papers, writings, or books of accounts in order to see whether they afford any sufficient presumption that there was such a deed or writing, and that Mr. Cowper did burn or destroy it.

As to the transaction at the late earl's house in the country, Mr. Sydenham was present when Mr. Cowper first opened the bureau, took out papers, and cancelled some of them. Afterwards Mr. Sydenham was admitted into the room when Mr. Cowper had a greater quantity of papers lying by him, torn and cancelled, which he frankly told Mr. Sydenham he intended to put out of the way and that he would look over all the earl's papers, preserve such as he thought proper, and destroy the rest. This was on Oct. 10. On Oct. 13, before Mr. Woodford came down, he ordered one of Lord Cowper's servants to carry down a large basket, full of paper writings, and books of account into the kitchen to be burnt, and accordingly they were burnt (Mr. Sydenham says by Mr. Cowper himself) in a very public manner in the kitchen fire, in the presence of several of the common servants, which, it is to be presumed, was not kept secret from Lady Cowper, for Mr. Cowper refused to let any person for her be present at the opening of the earl's papers (though she desired it), saying that they were private papers not fit to be seen, which was avowing to her his design to destroy some papers or at least to conceal them.

A It is asked, how came Mr. Cowper to open the late earl's bureau in the country, search his papers, and cancel and burn such as he thought fit, without the knowledge or participation of Mr. Woodford, and this, too, before the coming of Mr. Woodford, who was to come there by his appointment? Now, although each executor, having the whole office in him, has authority to do what Mr. Cowper did, yet I think he ought to have stayed for Mr. Woodford, the other executor, but then it B does not appear that Mr. Woodford, when he came, took upon him to act in any manner, or so much as to inquire concerning the late earl's papers or books of account or any of his affairs, and, indeed, he might reasonably think that Mr. Cowper, whom he found in the house, had taken some care or other about Lord Cowper's affairs. Probably he might think Mr. Cowper, being his brother and one who had no interest in his estate (that he knew of at that time), was more proper C than himself to look into bureaux or cabinets, and inspect papers, and it appears he did think so, for when they both came to Lord Cowper's house in town with Mr. Sydenham, Mr. Cowper brought with him the key of the bureau there, in which were several writings and papers, some of which Mr. Cowper only looked over and took away with him, saying they concerned the late earl personally and not his estate. As Mr. Cowper had the key of the bureau with him, so Mr. Wood- D ford let him lock up the closet where the bureau was and carry away the key, which was putting it into his sole power to look over all the rest of the papers and writings, and dispose of them as he had already done of some others in Mr. Woodford's presence. This accounts for Mr. Cowper's doing what he did in relation to the other papers or books of accounts at Colne Green, without the knowledge or participation of Mr. Woodford. Besides, either Mr. Cowper found E the deed or writing supposed by the defendants' counsel, at Lord Cowper's house in town or in the country. If it was at his house in town, the searching of his papers and writings there by Mr. Cowper, having a power over them, was in some sort by Mr. Woodford's consent; if in the country, that was done before and it cannot be imagined, if Mr. Cowper had in his power what he wanted there, he would then have burnt or destroyed so many papers or writings in so public a F manner, and after all this have possessed himself of papers and writings in town with the privity of Mr. Woodford, have ordered Mr. Sydenham to send them to his chambers, and several times after have told Mr. Sydenham he had been looking into them, and destroyed such as were not fit to be seen. Again, if Mr. Cowper had executed such a deed of release and had intended to suppress or destroy it, he would have taken a secret and clandestine way for that purpose, as the suppres- G sion of deeds does not in its nature suppose, and not have burnt papers and writings at several times in an open public manner.

For my part I declare that had there been the least positive proof of a release from Mr. Cowper, I would have totally dismissed the bill, but when such release or conveyance is only supposed or inferred from appearances out of which that supposition does not necessarily or even naturally arise, and when Lord Cowper's I leaving the declaration of trust in the hands of Mr. Powell does encounter it, I cannot but think this title is subsisting.

Upon the whole matter, my opinion is, this title should not have been set up, but now it is so, it appears a plain and a subsisting one. The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates. Otherwise great uncertainty and confusion would ensue, and, though I proceedings in equity are said to be secundum discretionem boni viri, yet when it is asked: Vir bonus est quis? the answer is, qui consulta patrum qui leges juraq; servat. As it is said in *Rooke's Case* (12), that discretion is a science, not to act arbitrarily according to men's wills and private affections, so the discretion which is exercised here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to, the other. This discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy. In others again, it relieves against the abuse, or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as

has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with: *Burgess* v. *Wheate* (13).

It is further to be observed that the legal interest of these lands passed by Lord Cowper's will, and the defendant, the present earl, has an estate for life only therein, with a reversion in fee after several intermediate remainders, some contingent, others vested, and, consequently, the plaintiff can have a conveyance only of such an estate as Lord Cowper has. Counsel make no objection for want of Lord Cowper's brother being a party, who has the next remainder and is not before the court. Therefore, I will take no notice of him, but the defendant must convey such estate and interest as he has in the Hertfordshire lands, and account for the profits. As to the time, or to what period this account is to go back, the court has very reasonably taken a latitude, determining upon the circumstances of the case, and since the plaintiff's demand is stricti juris, he ought, therefore, to have strict legal measure meted to him. The plaintiff's father filed his bill not long after the earl's death, and, if he had proceeded on that bill, might have had an account of the profits from that time in the same manner as, in case of a legal title, he would have had from the time of his entry, but afterwards he was so far from insisting upon a right to the profits thence, or upon the benefit of his claim by that bill, as to suffer a proceeding whereto he was party to be had in disaffirmance of it, and, therefore, the plaintiff's right must stand upon his own claim.

Consequently, I decree Earl Cowper to account for the profits of the Hertfordshire estate in question, the account to be taken from the filing of the plaintiff's bill, the defendant to have all just allowances and to be examined upon interrogatories as the Master shall direct.

Decree accordingly.

From this decree there was an appeal to the House of Lords, where the parties agreed, and that agreement was confirmed by Act of Parliament.

KEECH *v.* SANDFORD

[Lord Chancellor's Court (Lord King, L.C.), October 31, 1726]

[Reported Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223]

Trustee—Duty of trustee—Lease—Renewal refused for benefit of cestui que trust—Grant to trustee—Duty to assign lease to cestui que trust and account.

The lease of a market was devised to a trustee for the benefit of an infant. Before the expiration of the lease the trustee applied to the lessor for a renewal for the benefit of the infant. The lessor refused to renew for the infant for various reasons, but granted a renewal to the trustee for himself.

Held: the trustee must assign the lease to the infant and account for the profits, for (per Lord King, L.C.) if a trustee on the refusal to renew might have a lease to himself, few trust estates would be renewed to the cestui que use, and, although there was no fraud in this case, the trustee should rather have let the lease run out than have had it renewed to himself.

Notes. An infant can no longer hold legal estate: see s. 1 (6), s. 39 (3), Sched. I, Part III, to the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.), 436, 498, 855).

Distinguished: *Norris* v. *Le Neve* (1743), 3 Atk. 26. Applied: *Taster* v. *Marriott* (1768), Amb. 668; *Re Anderson's Estate* (1869), 18 W.R. 248. Distinguished:

Longton v. *Wilsby* (1897), 76 L.T. 770. Applied: *Griffith* v. *Owen* [1904–7] All E.R.Rep. 718; *Lloyd-Jones* v. *Clark-Lloyd*, [1919] 1 Ch. 424. Considered: *Re Jarvis*, *Edge* v. *Jarvis*, [1958] 2 All E.R. 336. Referred to: *Owen* v. *Williams* (1773), Amb. 734; *Stone* v. *Theed* (1787), 2 Bro.C.C. 243; *Randall* v. *Russell*, [1814–23] All E.R.Rep. 427; *Aberdeen Rail. Co.* v. *Blackie Bros.*, [1843–60] All E.R.Rep. 249; *Re Adams and St. Mary Abbotts, Kensington* (1884), 51 L.T. 382; *Re Biss*, *Biss* v. *Biss*, [1900–3] All E.R.Rep. 406; *Regal (Hastings), Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378; *Re Knowles' Will Trusts*, *Nelson* v. *Knowles*, [1948] 1 All E.R. 866; *Phipps* v. *Boardman*, [1964] 2 All E.R. 187.

As to accretions to trust property, see 38 Halsbury's Laws (3rd Edn.) 856, 857; and for cases see 47 Digest (Repl.) 102 et seq.

Bill by an infant beneficiary to have a lease which had been renewed to his trustee assigned to him and for an account of the profits since renewal.

A testator being possessed of the profits of a market, devised his estate to a trustee in trust for an infant. Before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant, which the lessor refused on the ground that it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do. There was clear proof of the refusal to renew for the benefit of the infant. The trustee obtained a lease made to himself. The bill was brought by the infant to have the lease assigned to him, and for an account of the profits, on the principle that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of cestui que use. This principle was agreed on the other side, although endeavoured to be distinguished on account of the express proof of refusal to renew to the infant.

LORD KING, L.C.—I must consider this as a trust for the infant, for I very well see that if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestui que use. Although I do not say there is a fraud in this case, yet the trustee should rather have let the lease run out, than to have had it to himself. It may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that rules should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to cestui que use.

Decreed that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

R. *v.* VICE-CHANCELLOR OF CAMBRIDGE UNIVERSITY

[Court of King's Bench (Lord Mansfield, C.J., Wilmot, Yates and Aston, JJ.), Easter Term, 1765]

[Reported 3 Burr. 1657; 1 Wm. Bl. 547; 97 E.R. 1027]

Corporation—Charter—New charter to existing corporation—Partial acceptance.

Per Lord Mansfield, C.J.: There is a vast deal of difference between a new charter granted to a new corporation (who must take it as it is given) and a new charter given to a corporation already in being and acting either under a former charter or under prescriptive usage. A corporation already existing is not obliged to accept the new charter in toto and to receive either all or none of it. It may act partly under it and partly under its old charter or prescription.

Mandamus—Election to office—Enforcement—High Steward of Cambridge University—Mandamus to keepers of university seal.

The Court **held** that a mandamus would lie to direct the keepers of the seal of Cambridge University to affix it to the instrument of the appointment of Lord H. as High Steward of the university, the court being satisfied that Lord H. had been duly elected to the office.

Notes. Considered: *R.* v. *Westwood* (1825), 4 B. & C. 781.

As to new charters affecting existing corporations, see 9 Halsbury's Laws (3rd Edn.) 26–28, and as to mandamus to enforce admission or election to office, see ibid., vol. 11, pp. 87, 88. For cases see 13 Digest (Repl.) 210–212, 227, 228; 16 Digest (Repl.) 343 et seq.

Case referred to:

(1) *R.* v. *Bland* (1740), 7 Mod. Rep. 355; 2 Burn's Eccles. Law, 9th ed., p. 116; 87 E.R. 1287; 16 Digest (Repl.) 361, *1371*.

Rule for a Writ of Mandamus calling on the vice-chancellor of Cambridge University to complete the election of the Earl of Hardwicke as high steward.

On the death of the first Earl of Hardwicke, a contest arose in the University of Cambridge between the Earl of Sandwich and the second Earl of Hardwicke, for the office of high steward. That officer was elected by a grace which must pass the caput unanimously, and be assented to by the houses of non-regents and regents. A grace passed the caput for the Earl of Hardwicke, and was assented to in the house of non-regents by a majority of two. On Mar. 30, 1764, it came on in the house of regents. The two proctors marked the votes in two lines, under "placet" and "non placet," and when cast up they were equal. The case was new, and they were at a loss what to do. The senior proctor (in the interest of Lord Hardwicke) insisted on a second scrutiny; supported by the order of the vice-chancellor. The junior proctor (in the opposite interest) refused going to a second scrutiny because they both agreed "that the votes were equal." He insisted on reporting that the votes were equal, which the other refused, and the report must be made by both concurring. Upon this, the vice-chancellor dissolved the congregation without any report having been made. Afterwards, it was discovered that Mr. Thomas Pitt, who voted in the regents house against the grace, was a master of above five years' standing and, therefore, ought to have voted among the non-regents. If this vote was bad, the placets had a majority of one. Mr. Pitt was admitted to the degree of master of arts on July 17, 1758, by virtue of a mandate from the King. On July 18, 1758, leave of absence was granted to him as to a person actually created master of arts. The proctors had, at first, made a mistake, each having omitted to mark the vote of the other, so that in the paper of the senior proctor the placets had a majority of one and in the junior proctor's paper the non placets had a majority of one. They discovered the cause of the difference, and concurred in setting it right, which made the votes agree in each paper.

Cause was now shown why a mandamus should not issue to the vice-chancellor and others, of the University of Cambridge, to complete the election of the Earl of Hardwicke. The rule was made, first, upon the vice-chancellor to show cause why a writ of mandamus should not issue, directed to him, requiring him to convene and hold a congregation or convention of the university, to the end and for the purpose that the proctors of the university might declare whether the majority of the votes in the regent-house of the university upon a grace proposed to that house on Mar. 30, 1765, for the election or appointment of Philip, Earl of Hardwicke, to be high steward of the university was against or in favour of the passing of the said grace. The second part of the rule was upon Daniel Longmire, clerk, and Ralph Forster, clerk, proctors of the university, to show cause why the like writ should not issue directed to them, requiring them to declare whether the majority of the votes in the regent-house of the university, upon a grace proposed in the house on Mar. 30, 1765, for the election or appointment of Philip, Earl of Hardwicke, to be high steward of the university was against or in favour of the passing of the said grace. The third part of the rule was upon the vice-chancellor, Daniel Longmire, Ralph Forster, William Roberts, and Henry Talbot, Keepers of the common seal of the said university, to show cause why the like writ should not issue, directed to them, commanding and requiring them to put and affix the common seal of the university to an instrument or letters patent appointing Philip, Earl of Hardwicke, high steward of the university pursuant to the tenor of a grace passed in senate on Mar. 30, 1765.

Sir Fletcher Norton, *Morton*, and *Blackstone* showed cause on behalf of the non-placets.

Yorke, *de Grey*, and *Ashhurst* for the mandamus.

LORD MANSFIELD, C.J., thought the matter lay in a narrow compass, and was not attended with any great difficulty. He stated the case from the affidavits, and explained the reasons upon which the court granted the present rule to show cause in the manner they had done, with particular directions for notice to be given to all parties who had any right or concern in the question. The university, as a body, had not thought fit to oppose it. But it was opposed by all the non placets, and by some of those persons who had the custody of the common seal of the university. He continued: Three questions arise upon this case: (i) on the validity of Lord Hardwicke's election; (ii) if his right be clear, then whether a mandamus is a proper remedy; (iii) If it is, then how it ought to be directed.

First, as to Lord Hardwicke's right. There does not seem to be the least contradiction as to matters of fact among the witnesses on the two sides, though they differ in opinion as to the right resulting from them. The mode of election is traced back to the year 1524 (240 years ago). The affidavits expressly swear that the mode of electing the high steward has been by a grace, etc. To this there is no contradiction. No one doubted it on the day of the election. But it is now contended that the election of high steward ought to have been in the same mode as the election of a vice-chancellor. This is rested on the statutes of Queen Elizabeth.

There is a vast deal of difference between a new charter granted to a new corporation (who must take it as it is given) and a new charter given to a corporation already in being and acting either under a former charter or under prescriptive usage. The latter, a corporation already existing, is not obliged to accept the new charter in toto and to receive either all or none of it. It may act partly under it and partly under its old charter or prescription. Whatever might be the notion in former times, it is most certain now that the corporations of the universities are lay corporations, and that the Crown cannot take away from them any rights that have been formerly subsisting in them under old charters or prescriptive usage. The validity of these new charters must turn upon the acceptance of the university. When Queen Elizabeth gave these statutes, the University of Cambridge was of ancient establishment, and had many prescriptive rights as

well as former charters of very old date. There was no intention to alter and overturn their ancient constitution. These statutes undoubtedly meant to leave a vast deal upon the ancient constitution of the university without repealing or abrogating their old established customs, rights, and privileges, nor could the university mean to accept them upon any such terms. Therefore, I am clear that the statutes of Queen Elizabeth cannot be set up to invalidate establishments subsisting long before she was born. The office of high steward was a very high office in the university long before she was born, and was possessed by very great men—a much higher office than stewards of courts leet. She never intended to alter the mode of election to it, nor was the mode of election objected to by anybody at the time of this election. Therefore, I am clear that the mode and manner of this election was right.

Then as to the right of Lord Hardwicke, under it. The election was quite fair. The little mistake in the marking was immediately set right. The proctors declared the votes to be equal. No one then thought of the objection to Mr. Pitt's vote. But disputes arising upon another matter, the congregation was dissolved. It is now objected by Lord Hardwicke that Mr. Pitt, being a stranger in the regent-house, obtruded his bad vote, which vote being disallowed will give Lord Hardwicke a majority of one. This depends on the validity of Mr. Pitt's vote on which there is no contrariety of evidence as to the facts. The whole turns upon the commencement of his inauguration to the degree of master of arts. This depends upon the usage of the university. It is sworn

> "that the degree begins from the day of creation, when it was conferred under a royal mandate."

Many circumstances of the present case confirm this. First, the leave of absence given the next day infers that he was then a master complete. Secondly, he appears to be obliged to dispute, in October, 1758, for he then pays for dising (a barbarous term for disputing), the fees for it being accounted for between the beadles, in October, 1758, whereas the fees of those graduates whose right commenced at the next general commencement were not accounted for until 1759. Thirdly, what shows that the degrees of such as take them by royal mandate must commence from their inauguration is the combination-paper, and the ordo senioritatis. Mr. Pitt's name is not in the former, but it is in the latter, being made after the general commencement in 1758. The names therein contained are either noblemen, or such as took their degrees by royal mandate. This suggests strongly that the degrees of those who take them by royal mandate commence from their creation. There is no evidence to the contrary, and the expiration of the quinquennium depends upon the commencement of it. If so, there is a majority of one for Lord Hardwicke unless the other side can disqualify some of those who voted for him [which, he held, they could not]. Thus stands the right to the office.

The next question is as to the remedy. There is no other than what is now applied for. This is the very reason of the court's issuing the prerogative writ of a mandamus, because there is no other specific remedy. It is admitted that a mandamus would lie if it can be considered as the case of a steward of a court leet. It is said that the franchise of the court leet is in the town of Cambridge, and not in the university. But the university have enjoyed it long, and they are now in possession of it, and they have elected Lord Hardwicke under this claim of many ages standing. And the town do not appear, to us, to dispute it. If it was not so, I should still think that, as here is no other specific remedy the court ought to grant the writ. So they will do in ecclesiastical cases, where it appears that there is no other specific remedy.

His Lordship added that the mandamus ought to be directed to the keepers of the seal of the university for the time being, requiring and commanding them to put the seal to the instrument of Lord Hardwicke's appointment, and the former parts of the rule ought to be discharged.

WILMOT, J., said that he thought that the rule ought to go as Lord Mansfield had proposed. If there was a clear right in Lord Hardwicke, the court ought to find out a suitable and adequate remedy, and even to have made a precedent if they could not have found one, for where there was a right, law and justice required that there should be some remedy or other. He declared that he never saw a clearer case both as to the right and as to the remedy, than this appeared to him to be.

This remedy, His Lordship said, is undoubtedly proper for this right. Here are vestiges in the records laid before us showing that there was a court leet in the town of Cambridge three or four centuries ago. But it does not appear that they have enjoyed or claimed any such franchise for a century or two last past, and they do not appear to be now in possession of any such franchise. On the contrary, the university are in possession of a court leet ever since 1690, at least seventy-five years, exercised by their deputy-steward. Therefore, it may be presumed that there has been some grant, surrender, forfeiture or assignment from the town to them, or something of the like kind, and we cannot presume any to be at this time in the town. If the presumption was not so strong upon such a possession, how could we say that the university have usurped a franchise which does not appear to be in anyone else? But I do not think it material whether the university have a right to a court leet, or not. For they have a right to such an officer as a high steward, with a stipendium, and he has a right to come here for this great prerogative writ of mandamus (a remedy which turns more, in my opinion, upon principle than upon precedent), and we ought to grant it because there is no other adequate remedy. The office of high steward appears to have been of 240 years' standing, and the greatest men appear to have been chosen into it. If the Earl of Hardwicke has been now duly and regularly elected into it, he ought to have a mandamus to admit him to his right.

The next question is, whether Lord Hardwicke was regularly elected, and had a majority of voices in the regent-house. [His Lordship referred to the evidence and said that Lord Hardwicke had a majority of legal votes. He concluded:] It follows that we ought to grant the mandamus in the manner it was originally prayed, viz., a mandamus to be directed to the keepers of the common seal of the university commanding and requiring them to put and affix the seal to the diploma or instrument appointing the Earl of Hardwicke high steward of the university, pursuant to the tenor of the grace passed in senate on Mar. 30, 1765.

YATES, J., agreed, holding that an old corporation who accepted a new charter might still act under their former charter or under prescriptive usage.

ASTON, J., also agreed and referred to *R.* v. *Bland* (1) [Dr. Bland, provost of Eton].

Rule granted.

MAGDALENE COLLEGE, CAMBRIDGE CASE

[Court of King's Bench (Sir Edward Coke, C.J., Croke, Doderidge and Houghton, JJ.), Easter Term, 1615]

[Reported 11 Co. Rep. 66 b; 1 Roll. Rep. 151; 77 E.R. 1235]

Statute—Crown—Application of statute to Crown—Express inclusion—Act for advancement of religion, learning and charity—Interpretation to suppress mischief and advance remedy.

The Sovereign is not bound by the provisions of a statute unless he is expressly named in the Act or on construction is clearly included. An Act designed for the maintenance of religion, the advancement of learning, and the relief of the poor, should be extended generally according to its words, and a construction tending to exclude the Sovereign from its application should be avoided. Such an Act should be favourably expounded, and no by-way left open to cause the great and dangerous mischiefs which would result from the obstruction of religion, learning and charity. The law is reason and equity, to do right to all and to keep men from wrong and mischief, and, therefore, the law will never make a construction against law, equity and right. The office of a judge when construing such a statute is so to interpret it as to suppress the mischief at which it is aimed and advance the remedy it provides. The Sovereign should not be exempted by construction of law out of the general words of the Acts made to suppress wrong because he is the fountain of justice and common right, and, being God's lieutenant, cannot do wrong.

Notes. Considered: *Colt and Glover* v. *Bishop of Coventry and Lichfield* (1612), Hob. 140. Applied: *R.* v. *Bishop of London and Burch* (*or Birch*) (1694), 1 Show. 493. Considered: *Thornby* v. *Fleetwood* (1720), 1 Stra. 318; *A.-G.* v. *Allgood* (1743), Park. 1; *A.-G.* v. *Walker* (1849), 3 Exch. 242; *Moore* v. *Clench* (1875), 1 Ch.D. 447. Applied: *Perry* v. *Eames*, *Salaman* v. *Eames*, *Mercers' Co.* v. *Eames*, *Mercers' Co.* v. *Eames*, [1891–4] All E.R.Rep. 1100. Considered: *Boarland* v. *Madras Electric Supply Corpn., Ltd.*, [1954] 1 All E.R. 52. Referred to: *Thomas* v. *Sorrell* (1673), Freem.K.B. 85; *R.* v. *Bishop of London and Lancaster* (1693), 1 Show. 441; *Abergavenny* v. *Brace* (1872), L.R. 7 Exch. 145; *Cayzer, Irvine & Co.* v. *Board of Trade*, [1927] 1 K.B. 269; *A.-G.* v. *Hancock*, [1940] 1 All E.R. 32.

As to construction of statutes generally, see 36 Halsbury's Laws (3rd Edn.) 382 et seq., and as to the application of statutes to the Crown see ibid., pp. 430–432. For cases see 44 Digest (Repl.) 197 et seq., 279–284.

Cases referred to:

(1) *Willion* v. *Berkley* (1561), 1 Plowd. 227; 75 E.R. 345; 44 Digest (Repl.) 222, *388.*

(2) *Croft* v. *Howel* (1578), 2 Plowd. 530; 75 E.R. 783; 13 Digest (Repl.) 194, *150.*

(3) *Stowel* v. *Lord Zouch* (1569), 1 Plowd. 353; 75 E.R. 536; 44 Digest (Repl.) 222, *389.*

(4) *Dean and Chapter of Bristol* v. *Clerke* (1553), 1 Dyer, 83a; 73 E.R. 181; 44 Digest (Repl.) 376, *2145.*

(5) *Eitrue's Case* (1572), cited 5 Co. Rep. at p. 14 b.

(6) *Duchy of Lancaster Case* (1561), ante p. 146; 1 Plowd. 212; 75 E.R. 325; 11 Digest (Repl.) 564, *24.*

(7) *Bishop of Winchester's Case* (1596), 2 Co. Rep. 43 b.

(8) *Cholmley's Case* (1597), 2 Co. Rep. 50 a; 76 E.R. 527; 11 Digest (Repl.) 642, *663.*

(9) *Porter's Case*, *A.-G.* v. *Porter* (1592), 1 Co. Rep. 16 b, 22 b; 76 E.R. 36, 50; 8 Digest (Repl.) 326, *91.*

(10) *Alton Woods' Case* (1600), 1 Co. Rep. 40 b; 76 E.R. 89; 11 Digest (Repl.) 642, *657.*

(11) *Liford's Case* (1614), ante p. 73; 11 Co. Rep. 46 b; 77 E.R. 1207; 19 Digest (Repl.) 547, *3866.*

(12) *Heydon's Case* (1584), 3 Co. Rep. 7 a; 76 E.R. 637; 44 Digest (Repl.) 203, *149.*

(13) *Lord Anderson's Case* (1599), 7 Co. Rep. 21.

(14) *Ecclesiastical Persons Case* (1601), 5 Co. Rep. 14 a; 77 E.R. 69, H.L.; 19 Digest (Repl.) 539, *3743.*

(15) *Calthorpe's Case* (1574), 3 Dyer, 334 b; 73 E.R. 756; 12 Digest (Repl.) 196, *1349.*

(16) *Wharton* v. *Morley* (1565), Cro. Eliz. 24; 78 E.R. 290; 11 Digest (Repl.) 641, *649.*

(17) *R.* v. *Sion* (*Abbess*) (1460), cited 1 Plowd. 152; 75 E.R. 233; 17 Digest (Repl.) 395, *1985.*

(18) *Earl of Leicester* v. *Heydon* (1571), 1 Plowd. 384.

Action in ejectment brought by John Warren against John Smith, M.A., in 1613, and declared on a lease made by Sir Francis Castillion, on Dec. 20, 1611, of a house in Aldgate, London, by force of which the plaintiff entered and was possessed until ejected by the defendant.

The defendant pleaded not guilty, and the jury gave a special verdict that long before the trespass and ejectment, the master and fellows of Magdalene College, Cambridge, being seised of the property on Dec. 13, 1575, by an indenture between them and Queen Elizabeth,

> "for divers considerations them thereunto especially moving, did give and grant to our sovereign lady the Queen all that their messuage [which was the messuage mentioned in the declaration] with the appurtenances, lying in the parish of St. Botolph without Aldgate, London, to have and to hold the said messuage, with the appurtenances to our said sovereign lady the Queen, her heirs and successors for ever, yielding and paying therefor yearly to the said master and fellows, and their successors, at the feast of St. Michael the Archangel, £15,"

with clause of distress, and under this condition of proviso following:

> "Provided nevertheless, that if our said sovereign lady the Queen, her heirs and successors, shall not sufficiently convey, and assure by letters patent under the Great Seal of England, the said messuage with the appurtenances unto one Benedict Spinola, merchant of Genoa, and his heirs, before the first day of April next ensuing, then this present indenture, and every gift, grant, and article therein contained, shall cease and be utterly void, and of none effect,"

as by the said indenture, whereof one part was sealed with the seal of the said master and fellows, and the other with the Great Seal of England appeared.

The jury further found the Ecclesiastical Leases Act, 1571, by which it was enacted that thenceforth all leases, gifts, grants, feoffments, conveyances or estates, to be made, had, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or warden of any hospital, parson, vicar, or any other, having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being parcel of any such college, church, cathedral, hospital, rectory, vicarage, or any other spiritual living, etc., to any person or persons, bodies politic or corporate, other than for the term of 21 years or three lives, should be utterly void and of no effect to all intents, constructions and purposes, etc. They found likewise the Act of confirmation of letters patent made in 1575 by which it was recited that where, after Nov. 18, 1558, divers and several honours, castles, lands, tenements, rents, reversions, services, and other hereditaments, were conveyed and assured to Queen Elizabeth, her heirs and successors, by divers and sundry persons, and bodies politic, as well for the discharge and satisfaction of great debts and sums of money, as for other good considerations, for the perfect assurance, confirmation, and further surety

of which, it was enacted that all feoffments, fines, surrenders, assurances, conveyances, and estates in any manner conveyed, had or made, or to be made at any time within seven years after the end of the session of the same Parliament

> "to or for our sovereign lady the Queen's Majesty, by or from any person or persons, bodies politic or corporate, of any honours, castles, manors, lands, tenements, etc., for any debt, sum, or sums of money, or other consideration whatsoever, shall stand, remain, and be good and available in law to all intents, constructions, and purposes, according to the true meaning, intent, and purport of the same, saving to all and every person and persons, etc."

Further, it was enacted that all letters patent, indentures and other writings, sealed with the Great Seal of England, or the seal of the duchy of Lancaster, or the seal of the county palatine of Lancaster, then made and granted by the Queen for any sum of money, or for any other consideration, were valid and effectual in law, etc., against the Queen, her heirs and successors, according to the tenor and effect of the same letter patent, etc.

They further found that Queen Elizabeth, on Jan. 29, 1574, by her letters patent under the Great Seal, granted to the said Benedict Spinola (who was then a free denizen) the said messuage with the appurtenances to have and to hold to him, his heirs and assigns for ever, which Benedict Spinola, on June 15, 1579, by his deed indented and enrolled in the Court of Chancery, did, for money, bargain and sell the said messuage, with the appurtenances, to Edward Earl of Oxford, and his heirs, by force whereof the earl entered, and was thereof seised in his demense as of fee, as the law required, and he being thereof so seised, Rowland Broughton and Elizabeth his wife in 1581 levied a fine of the said house, with the appurtenances, to the said Earl of Oxford and his heirs, with proclamations, which were found at large according to the statute. On May 9, 1582, the earl demised the house to Edward Hamond for 51 years, who on Nov. 9, 1583, assigned all his interest and term for years in the house to one W. Masham, who on Oct. 14, 1604, died thereof possessed intestate, after whose death Alice his wife took administration of his goods, etc. On Feb. 1, 1606, she married Francis Castillion.

Roger Kelke, master of the college, died on Jan. 8, 1602, and after his death Barnaby Gooche, Doctor of the Civil Law, was elected master of the college. Edward Hamond, in the name and stead of the earl then tenant of the house, paid to Barnaby Gooche £15 of the rent due to the master and fellows of the college at the feast of St. Michael, 1606, which £15 Barnaby Gooche received, and by writing under his hand, without a seal, acknowledged that he had received it. On Feb. 5, 1606, Barnaby Gooche entered, on behalf of the college, into the house, and with the fellows of the college by their indenture under their common seal, demised the house with the appurtenances to John Smith, the defendant, for six years. Sir Francis Castillion, upon the possession of John Smith, re-entered and made the lease to John Warren, who was ejected by John Smith.

The question which the jury referred to the court was whether, upon the whole matter, the entry of John Smith was lawful or not.

Hobart, *Montague*, *George Croke*, for the plaintiff.
Yelverton and *Thomas Crew* for the defendant.

SIR EDWARD COKE, C.J., in his report of the case, stated: In this case four points were moved and argued at the Bar. (i) if the conveyance made to Queen Elizabeth by the master and fellows of the college, of the said house, parcel of the possessions of the college after the Ecclesiastical Leases Act, 1571, was restrained by that Act; (ii) admitting the conveyance was restrained by the Act, if the Act of 1575 has supplied the defect thereof, and has made it perfect and effectual; (iii) admitting also that the Act of 1575 does not extend, nor give any force to it, if the said fine levied, and five years passed, shall bind the right of the master and fellows of the said college for ever; (iv) if the acceptance of the rent by the master of the college should disable or preclude him from entering into

A the house, and, if any of the points should be adjudged against the defendant, then his entry was not lawful and judgment should be given for the plaintiff.

As to the first, it was objected that by the rule of the law the King, not being named in the Act, is by the law exempted out of the Act, for the law gives the King the prerogative that for the dignity of his royal person he is not by construction of the law included within these common words, "person or persons, bodies B politic or corporate"; and be the statute affirmative, or be it negative, which is stronger, it shall not bind the King unless he is specially named, but he shall take benefit of a statute although he be not named, as the Statute of Westminster the First (1275), c. 36 [repealed] which settles reasonable aid (as well to make the eldest son knight as to marry the eldest daughter) in certain enacts that henceforth of a whole knight's fee be given only 20s. and of £20 land held in C socage, 20s. and of more, more, and of less, less, but it was held that forasmuch as the King was not named, he was not bound by that law. To settle that in certainty was the Act of 25 Edw. 3, St. 5, c. 11 [repealed], made, in which Act the King was specially named: vide Fitzherbert's Natura Brevium 82 F. acc. Also the statutes of limitations, scilicet, the Statute of Merton, 1235, and the Limitation of Prescription Act, 1540 [repealed], have never bound the King. So D the Statute of Westminster the Second (1285), c. 5 [7 Halsbury's Statutes (2nd Edn.) 377], which gives the plea of plenarty by six months, does not bind the King, because the Act is general and does not name the King. The statute of 27 Edw. 1 [Statute de Finibus, c. 4] which gives trial in the country by nisi prius, shall not bind the King: Fitzherbert's Natura Brevium 241 B; Y.B. 24 Edw. 3, 23. So by the Statute Quia Emplores Terrarum, E 1289, the King is not bound, as it is held in Y.B. 10 Hen. 7, 23 A., etc. The Statute of Magna Carta, c. 11, enacts in the negative, quod communia placita non sequuntur curiam nostram, sed teneantur in aliquo loco certo, but that does not bind the King, as it is adjudged in 23 Hen. 3, tit. Brief, and 31 Edw. 1, tit. Prerogative 28, for he may have a quare impedit in the King's Bench. Many other cases were cited upon this large and common ground, which you may find in our F books, and especially in 1 Plowd. Com. 240 b. in *Willion* v. *Berkley* (1): vide 11 Hen. 4, Quare impedit 120; 11 Hen. 4, 87; Br. Prerogative 57; 12 Hen. 7, 21 A. in *Stoner's Case*; 4 Edw. 3, 34; 30 Edw. 3, 5; 7 Hen. 4, 32 B.; 2 Dyer, 145 [pl. 66]. So in the case at Bar, forasmuch as the Queen was not named in the Act of 1571, she was not bound thereby, but was at liberty to take the said grant as she was before that Act.

G It was likewise urged that always after the Act of 1571 divers masters and fellows of colleges, deans and chapters, masters or wardens of hospitals, and others having spiritual and ecclesiastical livings, have made many estates and leases to Queen Elizabeth and to the present King [James I] which are granted over and transferred to many persons, and all these were made by the advice of men well learned in the law, and of the counsel learned of the late Queen and of the King H also, and a change in such a common and constant opinion, upon which the estates and interests of so many men depend, will be the occasion of great vexations, suits in law, and the ruin of many who have not only spent their substance, or the greatest part of it, upon such estates and leases, but also have spent much upon new buildings and other charges upon them, all which will be utterly lost by the change of the said continual practice. In such changes, rerum progressus osten- I dunt multa quæ initio præcaveri aut prævideri non possunt. Another says: Quod in ædificiis lapis male positus non est removendus; and the law says, interest reipublicæ ut sit finis litium.

As to the second point, it was argued by the plaintiff's counsel that, admitting the Queen was bound by the Ecclesiastical Leases Act, 1571, yet the Act of 1575 has made the grant to the Queen good and effectual, for, admitting that the grant to the Queen was voidable afterwards, or immediately void and of no effect, yet the Act has made it unavoidable, good and effectual, for the words are, for the perfect assurance, confirmation and further security of such assurances, conveyances and

estates, etc., it is enacted that they shall stand, remain, and be good and available in law to all intents, constructions, and purposes "according to the true meaning, intent, and purport of the same." So that it appears by the words of the Act that the full intent of the makers of it was to make that perfect which was imperfect, and to make that assured which was not sure, and to add greater force to that (by addition of further security) which was defective before; and to this purpose the makers of the Act, not only in the precedent words, but in those which are subsequent, are very provident, and in a manner curious to take away all evasion which might be made out of it, and, therefore, first, it is enacted that they shall stand, remain, and be good and available in law. To answer a secret objection which might be made upon the words of the Act, all feoffments, fines, assurances, conveyances, estates, etc., that they ought to be sufficient, for an insufficient thing is reputed in law for nothing. To oust that, these words are added, to all intents, constructions, and purposes, "according to the true meaning, intent, and purport thereof," so that the Act does not say that they shall be good and available, according to the strict construction and operation of the law (for if they were good and available in law, then there needed not any act to make them perfect or sure, or to add further security), but the words are: "according to the true meaning, intent, and purport of them." Without question in the case at Bar, the "true intent and meaning" of the master and fellows, and of Queen Elizabeth also, and the purport of the indenture was to convey the house to the Queen, her heirs and successors, for so much the indenture purports, although it be not of force to convey it. It was said that, if a bishop had made an estate or lease to Queen Elizabeth, and afterwards the Act of 1575 was made, that would have made good the estate or lease to the Queen, although it was never confirmed by the dean and chapter. So, if an infant had levied a fine to the Queen, or to others for the Queen's behoof, after the Act of 1575 the infant should never reverse the fine for nonage. Many other cases out of their own invention were put, which I purposely omit.

As to the third point, they argued that the said master and fellows of the college were a corporation aggregate of many, and had the entire fee in them, and by the statute of 4 Hen. 7, c. 24 [repealed], should be bound by fine and non-claim by five years, as it is adjudged in *Croft* v. *Howel* (2) (2 Plow. Com. 538) and in *Stowel* v. *Lord Zouch* (3) (1 Plow. Com. 376): vide *Dean and Chapter of Bristol* v. *Clerke* (4); vide 24 Edw. 3, 58, and that the statute of 1571 does not aid them in this case, because it extends only to leases, gifts, grants, or other assurances or conveyances made or suffered, and notwithstanding the word "suffered" yet there ought to be an assurance or conveyance suffered, to which they shall be party, as by a common recovery of lands had against them, or recovery of an annuity by consent against them, as appears in *Eitrue's Case* (5), in 1572, cited in 5 Co. Rep. at p. 14 b. But this case of a fine levied between strangers and non-claim by five years was never questioned or doubted, and it would be a great weakening of the general assurance of the realm if this Act should be construed against the letter to exempt all those named in the Act so that they should not be bound by any fine and non-claim.

As to the fourth point, forasmuch as the master, who is the head of the corporation, has accepted of the rent, and made an acquittance thereof under his hand, he has precluded himself from entering during the time that he is master, and forasmuch as he is precluded, the fellows, without their head, cannot enter.

Thereupon they concluded that for all these four points, or for some of them, for if any of them should be adjudged for the plaintiff judgment ought to be given against the defendant. Against which it was argued by the defendant's counsel, and they concluded that judgment should be given for the defendant.

As to the first, which was the principal point of the case, it was argued for the defendant and unanimously resolved by Sir Edward Coke, C.J., Sir John Croke, Sir John Doderidge and Sir Robert Houghton, JJ., upon solemn argument in court, that the Ecclesiastical Leases Act, 1571, extended to restrain the master and fellows of the college from conveying the house, parcel of the possessions of

A the same college, to the Queen, although the Queen was not expressly named in the Act.

First, it was resolved that the general words of the Act extended to the Queen, for the words were: "To any person or persons, body politic or corporate"; and without question the Queen was a person, as it is said in Y.B. 10 Hen. 7, 18 a., Rex est persona mixta, and that she was a body politic appears in 1 Plowd. Com. B in the *Duchy of Lancaster Case* (6), p. 213, in *Willion* v. *Berkley* (1), p. 234, and in many other books. If the Act be general, and the Queen be clearly included within the words, if she shall be exempt out of the Act, it ought to be by construction of law, and as this case is the law will not make such construction for reasons apparent in the Act itself. (i) The Queen, Lords Spiritual and Temporal, and the Commons who made the Act, have adjudged, as in the preamble appears, long leases C made by colleges, etc., to be unreasonable and against reason (a fortiori, an estate in fee simple) and the law, which is the perfection of reason, will never expound the words of the Act against reason. (ii) Parliament has adjudged them causes of dilapidations. (iii) To be the decay of all spiritual livings. (iv) The decay of hospitality. (v) The utter impoverishment "of successors incumbents in the same." On all these follows a consequent fearful and dangerous, decay of the true religion D and spiritual worship of God, for it is recorded in history that there were (among others) two grievous persecutions, the one under Dioclesian the other under Julian surnamed the Apostate, one of them intending to have extirpated all the professors and preachers of the word of God, and, therefore, the record says, occidit omnes presbyteros, but notwithstanding that religion flourished, for sanguis martyrum est semen ecclesiæ, and yet that was a dreadful and grievous persecution. But the E persecution under the other was more grievous and dangerous, quia (as the history says) occidit presbyterium, for he robbed the church and spoiled spiritual persons of their revenues, and took from them whatever they might live on. Thence in a short time ensued great ignorance of the true religion and service of God, and thereby great decay of the Christian profession, for none would apply himself or his sons or any other he had in charge to the study of divinity when they should have F after a long and painful study, nothing to live on: vide all this word for word in the *Bishop of Winchester's Case* (7), in 2 Co. Rep. at p. 44 b.

Therefore it was unanimously resolved that general statutes, which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words, and God forbid that by any construction the Queen, who made the Act with the assent of the Lords and Commons, should be exempted out of this Act of 1571 which provides necessary and profitable remedy for the maintenance of religion, the advancement of good literature, and the relief of the poor, and out of these colleges, deans and chapters, etc., as well the church is furnished with grave and learned divines, for the instruction of Christians in the true religion, as the commonwealth with learned men for the better administration of justice, as well temporal as ecclesiastical, which (religion and justice) are the main pillars which support the King's Crown. Therefore, of all others, the King who, as has been said, is persona mixta, medicus regni, pater patriæ, et sponsus regni, who per annulum is wedded to the realm at his coronation, should not be exempted out of this Act by construction of law, which would be against reason, and the cause of dilapidations, the decay of spiritual livings, of hospitality, of the utter impoverishment of successors, and by consequence the decay of religion and justice would ensue. Therefore, it is true, quod summa ratio est quæ pro religione facit: and Statute of Westminster the First, cap. ult. summa charitas est facere justitiam singulis, et omni tempore quando necesse fuerit. It is to be known that the law never presumes that anyone will do a thing either against religion or any religious duty, and, therefore, it is resolved in *Cholmley's Case* (8), in 2 Co. Rep. 51 a, where a reversion expectant on an estate tail is granted to one for the life of tenant in tail, and it was said that by possibility this grant for life might take effect, for the tenant in tail, having no issue, might become a monk, and

enter into religion, and then the grantee might have it during his natural life. There it is resolved that such superstitious and irreligious profession should not be presumed in law, Mic. 10 Hen. 6, fo. 8, pl. 27, J.S. brought an action of debt against Johan' Rector de T. in com' B. The defendant said that he was, before the day of the writ purchased, dwelling and conversant at B. in the county of N. et non allocatur, for a parson shall be intended by law to be resident upon his benefice for the cure of souls which he has there, for a parson who has cure of souls and is non-resident non est dispensator sed dissipator, non speculator sed spiculator, and therefore, no such thing shall be presumed. So in the case at Bar, the law will never make construction against the maintenance of religion, advancement of learning, and sustenance of the poor. It is enacted by the statute 1 and 2 Ph. & M., c. 8 [See of Rome; repealed S.L.R., 1863] :

> "That it should be lawful, etc., to give lands, tenements, etc., by feoffment, grant, or other assurance, or by last will and testament in writing, to any spiritual body politic or corporate,"

notwithstanding the Statute of Mortmain. One Allaine Clarke seised of certain lands in London in fee in 1557 by his last will in writing devised them to the master, fellows, and scholars of Trinity College, Cambridge, and to their successors for ever, for the finding of certain poor grammar scholars, etc. And in 1566 a great question was moved. (i) That the said college consisted not only of divines, but of others also. (ii) That the intent was to find grammar scholars, etc. (iii) That in the Wills Act, 1542, a statute of explanation of wills, bodies politic and corporate are excepted out of it, yet per opinionem omnium Justiciariorum utriusque banci et capitalis baronis scaccarii, the devise was held good, and the statute of 1 and 2 Ph. & M., c. 8 (being made for the maintenance of religion, advancement of learning, and exhibition of poor scholars), ought to be favourably expounded; and although the lands were held of the King, yet in such case the Act was expounded to bind the King, so the words of the statute of 4 Hen. 7, c. 24, of fines are general, yet the successor of a bishop, parson, vicar, or any other sole corporation, shall not be bound by construction of law as a corporation aggregate of many shall be, for then the bishop without the dean and chapter, the parson or vicar without the patron and ordinary, etc., might by their sufferance bind their successors, which would be the cause of dilapidation and diminution of spiritual livings, and, therefore, by construction of the general law are excepted, as it is held in *Stowel* v. *Lord Zouch* (3), in 1 Plowd. Com. 376, and *Croft* v. *Howel* (2), 2 Plowd. Com. 538.

By the Mortmain Act, 1531, it is enacted

> "that all conveyances, etc., to the use of parish churches, churchwardens, guilds, companies erected of devotion, or common assent, etc., and all other like uses and intents, should be void."

One Nicholas Gibson, being seised of a house and wharf in London, after the Act devised them to Avice, his wife, and her heirs, upon condition to found a free school, and for the sustenance of certain poor men and women. It was questioned if this condition was against the Act of 1531, as it appears in *Porter's Case* (9), and it is there adjudged that the general words of the Act do not extend to take away the good and charitable uses for instruction of youth in good literature, and for sustenance of the poor, for there it is said that no age was so barbarous as to abolish learning and knowledge, nor so uncharitable as to prohibit relieving the poor people, so that it appears by these cases that by construction of law lands conveyed for the advancement of learning or sustenance of the poor have been preserved and maintained against the general words of the said Acts, but it was never seen that a general Act, made for the maintenance of religion, advancement of learning, and relief of the poor, should be by construction of law so expounded that a by-way should be left open by which great and dangerous mischiefs should remain, and the necessary and profitable remedy suppressed, for the office of the

A judge is to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief. Such by-way shall never be left open by construction, although it be for the King's benefit.

That appears by the Act of 1 Eliz., c. 19 [repealed], by which archbishops and bishops are restrained from making any conveyance, etc., other than for three B lives, or twenty-one years

> "to any person or persons, bodies politic or corporate, other than to the Queen, her heirs and successors,"

out of which there are three material things to be observed: (i) That the Queen had been included within the said words of "person and persons, bodies politic, C etc.," if the said exclusion or exception had not been made. (ii) That if the said by-way had not been contained in the same Act, it never had been raised by construction of law. (iii) That forasmuch as the same words are used in the Act of 1571 "to any person or persons, bodies politic or corporate," and no exception or exclusion made of the Queen, by consequence it appears that it was the intention of the makers of the Act that the Queen should be bound thereby, and eo potius D because they had so good a pattern before them as the Act of 1 Eliz, c. 19, was. Although the true intent of the exception in the Act of 1 Eliz., c. 19, was for the support of the Crown, yet by importunity of suitors, many estates and leases were made to the Queen by archbishops and bishops with intent to grant them over to subjects to private uses, which the present King [James I], perceiving of his pious and religious care, that the possessions of the archbishops and bishops E should not be diminished by the said by-way, by an Act of Parliament, c. 3, in the first year of his reign [relating to episcopal lands], reciting that where archbishops and bishops by the law could not convey any of their possessions to other subjects, his most excellent Majesty, knowing that divers with great suit had endeavoured to frustrate the true intent of the law, of his Christian and princely piety and care intending to protect the said possessions from alienation or diminu- F tion for the better maintenance of God's true religion and hospitality and for avoiding of dilapidations, and thereby for ever after avoiding all suits and importunities concerning any of the said possessions, had of his mere and pious motion vouchsafed that it should be enacted that every archbishop and bishop and their successors should, after the end of the same session of Parliament, be utterly disabled in law to make, levy, or suffer any alienation, assurance, demise, charge, or con- G veyance of their possessions to the King, his heirs or successors, and that every such alienation, etc., should be utterly void and of none effect, to all intents, constructions, and purposes.

The second reason is that the King shall not be exempted by construction of law out of the general words of Acts made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot H do a wrong, Solum Rex hoc non potest facere, quod non potest injuste agere, and therewith agree 13 Edw. 4, 8 a, and *Alton Woods' Case* (10) in 1 Co. Rep. 44 b, 48 a, etc. Although a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of it, and to suppress wrong, shall bind the King, as appears in *Willion* v. *Berkley* (1) 1 Plowd. Com. 246. If tenant in tail before the statute De Donis Conditionalibus had alienated, either before issue I to bar the issue in tail, or after issue to bar as well the donor as the issue in tail, it was tortious, but no remedy was given for it until the statute De Donis Conditionalibus, was made in 1285, which Act says:

> "Dominus Rex perpendens, quod necessarium et utile est in præd casibus apponere remedium, etc., statuit, quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi . . ."

Willion v. *Berkley* (1) was that land was given to King Henry VII and to the heirs males of his body, and the question was whether the King, forasmuch as he

was not expressly restrained by the Act post prolem masculum suscitatum might alienate or not. It was adjudged that he could not alienate, but that he was restrained by the Act, for three reasons. (i) Because such alienation before the statute was wrongful, although such wrong wanted remedy, for there it is said it would be a hard argument to grant that the statute which restrains men from doing wrong and ill, should permit the King to do it. (ii) Forasmuch as the Act was statutum remediale, and provided a remedy for this remediless wrong, and that it was necessary and profitable to provide such remedy, it was adjudged that it should bind the King. (iii) Because it was an act of preservation of the possessions of noblemen, gentlemen and others, it should also bind the King, and the Act should not bind the King only when he took an estate in his natural capacity, as to him and the heirs males of his body, but also when he claimed an inheritance as King by his prerogative. Therefore, if tenant in tail, after the said Act, be attainted of high treason, although the King claimed the forfeiture, as King by his prerogative, yet the King was bound by the Act, for there should be no forfeiture to bar the issue in tail as it was at the common law, as it is held in 7 Hen. 4, 31; 8 Hen. 4, 9 A, B; 7 Rich. 2, tit. Aide del Roy.

So in the case at Bar, the Act of 1571 has all the said three qualities. For, (i) it was to suppress wrong; for dilapidations and diminution of spiritual livings, etc., as appears before, are wrongs, and such wrongs as are quodam modo punished by the law, for the master, dean, etc., for dilapidations or wasting, or diminution of the revenues of their house, might be deprived, as appears in 29 Edw. 3, 16 A; 2 Hen. 4, 3 B; 11 Hen. 6; 20 Hen. 6, 46 A; 9 Edw. 4, 34 A. Resolved in a Parliament held at Carlisle in 1307, quod vide before in *Liford's Case* (11) (ante p. 73 and a notable record in 19 Edw. 3. Rex amovit custodem hospitalis de suo patronatu, qui male dispendit proficua domus, etc., because it is against their office and duty to waste the possessions of their houses, which are committed to them pro bono publico. (ii) This Act of 1571 is actus remedialis, and was necessary and profitable to provide such remedy for the public good of the whole ecclesiastical estate, etc. (iii) This Act is an act of preservation, sc. to preserve the possessions of colleges, deans and chapters, hospitals, etc., and, therefore, for all these three causes shall bind the Queen. Where it is enacted by the Statute of Westminster the Second, c. 5: Quod quotiescunque aliquis jus non habens tempore hujusmodi custodiar' præsentaverit, etc., it was resolved by Sir Edward Coke, C.J., Croke, Doderidge and Houghton, JJ., that the Act being made to suppress wrong should bind the King. So the law is well resolved in a case which was left doubtful in 35 Hen. 6, 60 A, B, *Ratcliff's Case*. To conclude this reason, it is notably said in 24 Edw. 3, 41 A that the law is reason and equity, to do right to all and to keep men from wrong and mischief, and, therefore, the law will never make construction against law, equity, and right.

The third reason is that the general words of a statute which tend to perform the will of the founder or donor shall bind the King, although he be not named, and that appears in Statuto Templariorum, in 1324 where it is said:

> "Ita semper quod pia et celeberrima voluntas donatoris in omnibus teneatur et expleatur, et perpetuo sanctissime perseveret."

The Act De Donis Conditionalibus is notable to this purpose, for there it appears that it was necessary and profitable that the will of the donor should be observed. The words of that Act to this purpose are:

> "propter quod dominus Rex perpendens quod necessarium et utile est, etc., apponere remedium [and what was such remedy] statuit quod voluntas donatoris in carta doni sui manifeste expressa de cætero observetur,"

which bound the King, as it is adjudged in *Willion* v. *Berkley* (1) (1 Plowd. at p. 247) where it is said that men ought to observe the intent or will of other men, and to violate it is ill. In the case at Bar, the intent of the founder of the college was for the maintenance of divines, the advancement of liberal arts and sciences,

A and to educate poor young persons in virtue and learning, which God forbid should not be performed. Therefore, it is a stronger case, and in a more pious and public degree than the Act De Donis Conditionalibus which was enacted for the preservation of private estate tails to particular families.

The fourth reason is that the master and fellows of the college are by the said Act disabled to grant, and, if they be disabled to grant, the Queen cannot take B from them who are so disabled. The words of the Act are

> "all leases, gifts, grants, etc., to be made, etc., or suffered by any master and fellows of any college, etc., shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, custom, or usage to the contrary notwithstanding";

C which is as much as to say that every master and fellow of a college shall be disabled from making any lease, gift, grant, etc., but that every such lease, gift, grant, etc., shall be utterly void to every intent and purpose; for when, by authority of Parliament, the grants to be made by any master and fellows of a college, are made utterly void thereby the masters and fellows are disabled by Parliament from making any grant, for in every grant there ought to be grantor, grantee, and thing D to be granted, and when the grant of the thing is made void, thereby the grantor is disabled from granting it. But this disability is not simpliciter, sed secundum quid, for, if the master and fellows of a college make such grant, it shall not be avoided by the master himself, but by his successor, as it was resolved in this case, and oftentimes has been resolved before now.

The fifth reason is that in Acts of Parliament, which are to be construed accord- E ing to the intent and meaning of the makers of them, the original intent and meaning is to be observed, and it appears that the intent of the master and fellows was that they would convey the house to Benedict Spinola and his heirs, and because they could not do it de directo, they attempted to do it ex obliquo, to grant it to the Queen and her successors, but upon condition contained in the same grant that the Queen within three months should grant the house to Spinola and his F heirs, so that it was endeavoured that the Queen, who was the fountain of justice, should thereby be made the instrument of injury and wrong, and of a violation of a pious and excellent law which she herself, for the maintenance of religion, advancement of the liberal arts and sciences, and for sustenance of the poor, had made. Where the master and fellows were seised of the house to them and their successors for ever, in jure collegii pro bono publico, and to pious and charitable uses, now it G should be converted for the private use of Spinola and his heirs for ever, sicque (as the Statute of Carlisle, 1307, speaks) quod olim in usus pios ad divini cultus augmentum et cætera opera pietatis charitatisve fuit erogatum, nunc in sensum reprobum est conversum. The poet does well reprehend that

> ——Fuit hæc sapientia quondam,
> Publica privatis secernere, sacra profanis.

H

It was resolved that the law will never make an interpretation to advance a private and to destroy the public, but always to advance the public, and to prevent every private, which is odious in law in such cases. Therefore, it is well said in *Heydon's Case* (12). The office of judges is always to make such construction as to suppress the mischief, and advance the remedy, to suppress subtle inventions and I evasions for the continuance of the mischief, et pro privato commodo, and to add force and life to the cure and remedy according to the true intention of the makers of the Act pro bono publico. If it should be lawful for masters and fellows of colleges, deans and chapters, etc. to convey to the Queen with a condition to grant to a subject, without question that construction would tend to the continuance of the mischief, et pro privato commodo.

In Y.B. 17 Edw. 3, fo. 59, pl. 58, the Friars Carmelites, who then had no place of habitation, obtained of one John Merite, who was seised of ten acres of meadow, held of the Bishop of Winchester, to have the said acres of meadow for a place

of habitation for them, and because John Merite could not grant them the ten acres by reason of the Statute of Mortmain, by covin between John Merite and the Friars Carmelites to toll the bishop of his seigniory (which was the impediment), John Merite (to make an evasion out of the Statute of Mortmain) granted the ten acres to the King, his heirs and successors, whereby the bishop's seigniory would be extinct, to the intent that the King would grant over the same to the Friars Carmelites, which he did accordingly. Because it was by covin between them, as aforesaid, to toll the bishop's seigniory, it was adjudged that the charter should be repealed, and that the Friars Carmelites should be distrained from delivering the charter to be cancelled. Out of this case five things were observed. (i) That he who makes the King, who is the fountain of justice, to be the instrument of fraud and covin, and thereupon obtains letters patent, that they are void, quia dolus circuitu non tollitur. (ii) If the King is endeavoured to be made an instrument to toll the right of another, and to that end a man obtains letters patent, such letters patent shall be repealed. (iii) Although such covin and fraud was not contained in the grant made to the King, but appears only by averment dehors, yet the patent shall be repealed. (iv) Although the Friars Carmelites were of a profession of religion, and had no habitation before, so that it seemed to be a work of piety and charity to provide an habitation for them, yet non facias malum, ut inde fiat bonum. (v) That such charter, so obtained, was adjudged to be repealed by the common law. And the like case, Y.B. 21 Edw. 3, fo. 46, pl. 65, *The Master and Scholars of Merton's Case.*

Vide Bracton in the beginning of his second book,

> "Nihil aliud potest Rex in terris, cum sit Dei minister et vicarius quam quod de jure potest; et paulo post, itaque potestas juris suæ est, non injuriæ, et [observe well] cum sit author juris, non debet inde injuriarum nasci occasio, unde jura nascuntur."

The Chief Justice said that if one who intends to sell his land, had by fraud conveyed it by deed enrolled to the Queen to the intent to deceive the purchaser, and afterwards he sells the land to another for a valuable consideration, and makes a conveyance accordingly, in that case the purchaser shall enjoy the land against the Queen by the Fraudulent Conveyances Act, 1584, for, although the Queen is not accepted, yet the Act being general, and made to suppress fraud, shall bind the Queen. So he said, if tenant in tail be seised of land, the remainder over in tail or in fee, and he in remainder knowing the tenant in tail will alienate the land, and by recovery bar his remainder, to the intent to deprive the tenant in tail of his birthright, and the power which the law gives him to bar the remainder, and on purpose and with intent to deceive the purchaser, grants his remainder to the Queen by deed enrolled, and afterwards tenant in tail for a valuable consideration alienates the land by a common recovery, and dies without issue, the purchaser shall enjoy the land against the Queen, by the statute of 1584, the words of which are

> "that every conveyance, etc., made, etc., to the intent and of purpose to defraud and deceive any purchasers, etc., shall be deemed only against such purchaser, etc., to be utterly void."

In those words it is to be observed that such former fraudulent conveyance made by the vendor himself is not only restrained, but generally that every conveyance made of purpose and intent to deceive a purchaser, shall be void. Therefore, the conveyance of the remainder to the Queen, of purpose and intent to deceive a purchaser, is directly within the words and purview of the Act. Of such opinion was Popham, C.J., openly in the Exchequer Chamber. The said cases of 17 Edw. 3, fo. 59, pl. 58, and 21 Edw. 3, fo. 46, pl. 65, are stronger than this is, where the party grieved was relieved by the common law, forasmuch as the King cannot be an instrument of fraud and deceit, et cum sit author juris, non debet inde injuriarum nasci occasio, unde jura nascuntur. Vide *Cholmley's Case* (8), in 2 Co.

Rep. 51, 52. It was said that the law has given the King a great prerogative above any of his subjects, that if by fraud or false suggestion he is deceived, he himself shall avoid his own grant, jure Regio. That appears in Y.B. 21 Edw. 3, fo. 47, pl. 68, in the *Earl of Kent's Case*, and Staunford, King's Prerogative 84 a.

The sixth reason is that the statute has made void all leases, grants, etc., other than for twenty-one years, or three lives, whereupon the accustomed rent or more is reserved, which, being express and demonstrative of these two particular cases, excludes all others.

As to all the cases which have been put on the other side, it was resolved, (i) That none of them impugn any of these reasons or grounds. (ii) That where the King has any prerogative, estate, right, title, or interest, by the general words of an Act he shall not be barred of them, as in the case of reasonable aid, the King has an estate and interest in it, and, therefore, the general words of the Statute of Westminster the First, c. 36, shall not extend to it. Also the King has a prerogative quod nullum tempus occurrit Regi, and, therefore, the general acts of limitation or of plenarty shall not extend to him. So the King, by his prerogative, may sue in what court he pleases, and of this prerogative he is not barred by the general purview of the Act of Magna Carta, c. 11, et sic de cæteris. But in the case at Bar, the King is not excluded of any estate, right, title, interest, or prerogative, that he had before the Act in the said house. Therefore, for all these reasons it was concluded, that this Act of 1571 should bind the Queen. Note, reader that the general statute of 32 Hen. 8, c. 36 [relating to fines for avoiding of controversies] shall bind the King, as appears in *Lord Anderson's Case* (13), 7 Co. Rep., 22.

As to the number of the leases which have been made since the statutes of 1571 by masters and fellows of colleges, deans and chapters, masters of hospitals, etc., to that it was answered: (i) That it was more ex consuetudine clericorum, who imitated precedents of leases made before the Act than of any sage advice of men learned in the law. (ii) Multitudo errantium non parit errori patrocinium. (iii) The inconvenience is greater and concerns more persons, and in a more high degree on this side than on the other, for in the famous universities of Cambridge and Oxford there are forty-two colleges, besides the colleges of Westminster, Winchester, Eton, Sion, Gresham, etc. There are twenty-four deans and chapters; archdeaconries, sixty; dignities and prebends in cathedral churches, 400; parsonages and vicarages, 8,803; and hospitals an exceeding great number. So that give all these, and their successors, power from time to time for ever, by a mean, or by-way, to alienate the possessions of the colleges, deans, and chapters, archdeaconries, prebends, parsonages, vicarages, hospitals, etc., which were given to religious, pious, charitable and public uses, would be of greater inconvenience and consequence than the destruction of certain estates and leases made since the Act of 1571 of the possessions, either of ecclesiastical persons, or of the poor, originally given for the maintenance of works of piety and charity, and now transferred to private persons, and converted to private uses; and the restoring of these possessions to their original foundation or endowment for the maintenance of religion, the advancement of liberal arts and sciences, sustenance of the poor, and other works of charity, pro bono publico. (iv) It would tend to the great prejudice of archbishoprics and bishoprics, for if deans and chapters should have power to alien not only their possessions, but their cathedral churches, where would then be cathedra episcopi? Where would be his prebendaries qui præberent auxilium episcopo, in consultation for the suppressing of heresies and errors, and in the true instruction of men in religion, and the spiritual worship of God committed to their charge, and in the celebration of divine service, etc. So of archdeacons, etc. (v) There never was any judicial opinion in any court that the Queen was not bound by the Act of 1571, but on the other side it has been often resolved in the highest court of justice that Queen Elizabeth was bound by the Act. Therefore, it was resolved in the Parliament held in 1601 by Popham and Anderson, C.JJ., and divers other justices, assistants to the Lords in Parliament, that the Queen was bound by the Act of 1571 (*Ecclesiastical Persons Case* (14)), which resolution

of the judges the Lords and Commons in Parliament well allowed of, and, therefore, in the Act 43 Eliz., c. 1 [relating to the confirmation of certain grants made to the Queen, and of grants made by the Queen] in the clause of grants, etc., made to the Queen there is an exception in these words:

> "other than conveyances or estates heretofore had or made by any ecclesiastical person or persons, bodies politic or corporate, not having power or ability by the laws of the realm, to make the same."

By which words the whole Parliament well approved of the resolution of the judges as to this point.

Also at the Parliament held in 1603 when the bishops' Bill was read to restrain them from conveying to the King, etc., it was moved by Archbishop Whitgift that deans and chapters and others having ecclesiastical livings should be restrained and inserted in the Bill also as well as archbishops and bishops, and it was again resolved by the justices, assistants at the same time, that they were restrained by the statute of 1571 from making any conveyance to the King of any part of their possessions. So it was said it had been resolved before that time, and, therefore, they were omitted in the Bill concerning the disability of archbishops and bishops at the same Parliament in 1603. Of what authority the resolution of the judges assistants in Parliament is, appears in 39 Edw. 3, 1 A, B. The Duke of Lancaster, and Blanch his wife, brought a scire facias against Lady Latimer, and a question was moved concerning the abatement of the writ. THORP, C.J., informed the court that he was in Parliament when such a question was debated, and there it was resolved that the writ should not abate, to which SERJEANT CAVENDISH said: "My Lords, you are our judges, and we have none other judges but you, in this place; also that which was resolved in Parliament is not of record, and if you will adjudge that we shall answer, we will readily answer." To which THORP, C.J. (who gave the rule of the court), said: "We who are judges may remember it as well as if it was in writing, and we will not adjudge the reverse of what is adjudged there, wherefore answer." On which book the Chief Justice strongly relied, as well for the authority of the resolution of the judges in Parliament as for the credit of the report of the judges. Note, reader, as it is observed in the *Ecclesiastical Persons Case* (14), 5 Co. Rep. 14 b, the Act of 1571 has been always construed beneficially, to prevent all inventions and evasions against the true intention of the Act, as appears there by divers resolutions there reported. Also it has been often held that where the statute says master and fellows of any college, be the college incorporated by the same name or by the name of warden and fellows, or warden and scholars, or warden, fellows and scholars, or by the name of master, fellows and scholars, or master and scholars, or provost, fellows and scholars, or by any other name of corporation, and be the college temporal for the advancement of liberal arts and sciences or to educate youth in good literature, or mere ecclesiastical, or mixed, every such college is within the provision of this Act. Where the statute says, master or warden of any hospital, be the hospital incorporated by any other name or be it a sole corporation, or a corporation aggregate of many, the statute extends to all manner of hospitals et sic de cæteris, for this Act has always had a benign and favourable construction.

As to this second point, it was resolved that the statute of 1575 has not given any force or effect to the grant made to the Queen, but that after this Act the grant remained of the same force as it was before the Act, and that for three reasons. This conveyance to the Queen is out of the words of the Act of 1575 for two reasons. Because the words of the statute are:

> "Where since Nov. 18, 1558, divers and sundry manors, lands, tenements, etc., have been conveyed and assured to Her Highness, her heirs and successors, by and from divers and sundry persons and bodies politic, as well for satisfaction of great debts and sums of money, as for other good considerations; for the perfect assurance, confirmation, and further surety whereof, be it enacted, that all feoffments, fines, surrenders, assurances, conveyances, and

estates, etc., to or for our sovereign lady the Queen, her heirs and successors, by or from any person or persons, bodies politic or corporate of any manors, lands, tenements, etc., for any debt, sum, or sums of money, or other consideration whatsoever, shall stand, etc., good, etc."

So that it appears that only such conveyances are established by this Act which are made for satisfaction of debts and sums of money or other good consideration, which words in the preamble are joined to the body of the Act, for immediately after those words, the statute says, for the perfect assurance, etc., "whereof, be it enacted," and, therefore, although the words are in the body of the Act, "for any debt, sum of money, or other consideration whatsoever," omitting "good" before consideration, yet it is necessarily implied, not only by the connection of the preamble to the purview, but also is implied in the word "consideration," for in *Calthorpe's Case* (15) (3 Dyer, 336 b) consideration is described to be a cause or occasion meritorious, requiring a mutual recompense in fact or in law, and inasmuch as the grant of the house to Queen Elizabeth by the master and fellows of the college was not for any debt, sum of money, or other good consideration, for this cause the grant was out of the letter of the Act, and it was observed that the Queen should never pay the said rent reserved on the grant, for the rent was payable only at the feast of St. Michael the Archangel, and by force of the condition, which was compulsory, the Queen ought to grant it over by April 1 or forfeit her estate. There was not only an omission of a good consideration, but also an addition of an ill and fraudulent practice to make the Queen, who was the fountain of justice, to be an instrument, and that constructively by condition (which in truth was against the honour and dignity of the Queen) to convey it to a subject, Benedict Spinola, and all this to make an evasion (if possible) out of the Act of 1571.

Admitting that the grant had been for the satisfaction of a debt, sum of money, or other good consideration, yet the Act of 1575 shall not be extended to this case; for the better apprehension of which, and for the true understanding and construction of the Act, it must be known that as to this purpose there are five kinds of disabilities or imperfections, whereby deeds, or other instruments and conveyances to the Queen, may be impeached. (i) In respect of the disability of the person of the grantor. (ii) By reason of the nature of the thing granted. (iii) Of the estate of the grantee. (iv) Of the manner of the grant which has no legal foundation. (v) In respect of the omission of some circumstance required by law, but having a firm commencement or foundation.

As to the first, persons are disabled either by common law, or by Act of Parliament; by common law, as by reason of infancy, profession, idiocy, non sanæ memoriæ, coverture, etc. Also of these disabilities by common law, some are absolute, as infants or monks, who cannot do any act which shall bind them, but that by law it may be in time avoided, and some disabilities are secundum quid and not simpliciter, and, therefore, if an idiot, non compos mentis, feme covert makes any conveyance, unless it be by fine or recovery, they are avoidable. So a bishop without the dean and chapter, a parson or vicar without the patron or ordinary, a prebendary without the bishop, dean, and chapter and such like have power to dispose of their possessions during their incumbency, but not to prejudice their successors. Disability by Parliament, as master and fellows of colleges, deans and chapters, and others named in the Act of 1571, and now archbishops and bishops by the statute of 1603 [1 Ja. 1, c. 3, relating to episcopal lands] all which are disabled from doing anything in prejudice of their successors. As to the second, in respect of the nature of the thing granted, as if the donee in tail holds of his donor by fealty, and the donor by deed enrolled grants fealty to the King, this grant is merely void, because it is an incident inseparable to the reversion, as it is held in 26 Ass., p. 66. So if a founder of a college will grant his foundership to the King by deed enrolled, it is void, for it is inseparable to the blood, as it is held in the time of Henry VIII, by Brooke. As to the third, in respect of the estate, as if tenant in tail of land by deed enrolled grants the land

to the Queen in fee, it shall not bind his issue in tail in respect of his estate tail. As to the manner of the grant which has not a legal foundation, as if a man seised of land in fee, grants the land after his death to the Queen, her heirs and successors, or such like, which are against the rules of the law. As to the omission of some circumstance, as if a man is seised of lands in fee and by deed, in satisfaction of a debt or sum of money or other good consideration, grants it to the Queen, her heirs and successors, and this deed was never enrolled, here was a good commencement, but it wanted enrolment.

For the first it must be known that the general words of the Act of 1575 shall not enable any person to make any conveyance who was disabled by the common law, as if an infant had conveyed land to the Queen by deed enrolled, that is not established by the Act, because the person of the infant, during his minority, was utterly disabled. So, if an infant had levied a fine to the Queen before the Act of 1575 and afterwards the said Act was made, yet the infant, notwithstanding the statute, might reverse the fine by writ of error. So it was resolved in 1589 in the King's Bench by WRAY, C.J., et totam curiam, in *Vaughan's Case*. The reason thereof is proved by the rule of our ancient books, sc. in 22 Edw. 3, Corone 276. And it is enacted by the Statute of Westminster the Second, c. 12: "Quod si appellatus de felonia, etc., se acquietaverit, etc., restituant hujusmodi appellatores damna appellatis." The case was that an appeal of death was brought against a monk, who was acquitted, and thereupon he prayed his damages according to that Act, but (because a monk was a person disabled by the common law from recovering any damages, and the general words of the Act do not enable any person who was disabled by the law) for this cause it is there held that he should not have any damages. The same law as there tenetur if an appeal be brought against a feme covert and she be acquitted, she shall not have damages, for she is disabled by the law to sue alone. It is enacted by the Statute of Marlbridge, c. 6, that the lord by knight's service shall not lose the wardship by feoffment made by collusion, veruntamen non licet eis hujusmodi feoffatos sine judicio disseisire, sed brevia habeant de hujusmodi custodia sibi reddenda, yet, if the tenant enfeoffs the villain of the lord upon collusion, the lord may enter and expel him and shall not be put to an action, as tenetur 33 Hen. 6, 16, for the general words of the Act shall not enable the villain who is disabled against his lord by the common law, and, therefore, if the lord brings an action against him, according to the letter of the law, he shall be enfranchised. A fortiori in the case at Bar when the master and fellows of the college are disabled by the Act of 1571 from making a grant to bind their successors, the general words of the Act of 1575 shall not enable them to make any estate against the act of 1571. So if a bishop, without the assent of the dean and chapter, by deed enrolled had granted land to the Queen, her heirs and successors, and afterwards the statute of 1575 is made, this grant is not made good against the successor, for the person of the bishop is disabled from granting it without the assent of the dean and chapter, to bind his successor. So it was resolved in 1580 as DYER reports, which I have under his hand, but the same is left out of the printed book, the same law of a prebendary, parson, etc. But know, reader, that there is a difference between a general Act, "by or from any person or persons, bodies politic or corporate," as the Act of 1575 and an Act which specifies and mentions particular kinds of bodies politic and corporate, as the statute 1 Edw. 6, c. 14 [relating to the dissolution of colleges], by which it is enacted that

> "every gift and grant heretofore made to the late King, and to his heirs, or to our sovereign lord the King that now is, and to his heirs, by any archbishop, dean, archdeacon, treasurer, prebendary, etc., of any manors, lands, tenements, etc., to any of the said benefices, prebends, etc., belonging, shall be good and effectual in the law, to all intents and purposes."

In *Wharton* v. *Morley* (16) in the Exchequer in 1565 the case was that a prebendary of York, by deed indented, granted parcel of the possessions of his prebend to

King Henry VIII, his heirs and successors, and although the deed was enrolled and the grant was made without assent of the bishop, dean, and chapter, that yet the grant was adjudged good because the prebendary was expressly named in the Act.

2. If a grant had been made to the Queen of an inseparable incident, as of a foundership, or of the said services of the donee in tail, the Act of 1575 would never make such grant good, because such things are not grantable.

3. If tenant in tail by deed grants his land to the Queen, such grant is made good against the issue in tail by the Act of 1575 for the person of the tenant in tail is able and he has power over the land. So was it held in *Vaughan's Case*, but if husband and wife by deed grant the land of the wife to the Queen, that is not made good by the Act to bind the wife after the coverture, or her heirs, for there the person of the feme covert is disabled from conveying her land, unless it be by fine upon due examination. So also was it held in *Vaughan's Case*.

4. When the manner and composition of the deed is void in law, as in the case which has been put, if a man seised of lands in fee by deed for a good consideration grants the land after his death to the Queen, her heirs and successors, such grant is not made good by the general words of the Act of 1575, and therewith agree Y.B. 38 Hen. 6, 33 B, the *Abbess of Sion's Case* (17) and *Earl of Leicester* v. *Heydon* (18), 1 Plowd. at p. 400, a stronger case than this is. Quæ malo sunt inchoata principio, vix est ut bono peragantur exitu: vide 4 Edw. 4, 31; 12 Hen. 4, Formedon 15.

5. When the person is able, and has power over the land and the deed is good and legal, but wants circumstance, as enrolment, or the like, there such deed is established and such omission supplied by the Act of 1575 for the Act makes the conveyance good "according to the true intent and purport thereof," and in such case the purport of the deed is sufficient enough, although it was not of any effect to pass the thing.

The Act of 1575 might have some operation as this case is upon the grant to the Queen, insomuch as Dr. Kelke, the master of the college, was then alive, and the Act of 1571 has disabled the master and fellows as to the successors of the master. This point was so concluded, quod ubi quid generaliter conceditur, inest hæc exceptio, sinon aliquid sit contra jus fasque. The Act 43 Eliz., c. 1 [1601, confirmation of certain grants], has explained and expounded this Act of 1575 as appears before. And, note reader, if the Act of 1575 should make good conveyances made by persons disabled, it would not make effectual estates made before the Act, but give liberty within seven years after to make them, which the statute never intended, for thereupon great prejudice and mischief would ensue.

As to the third general point, it was resolved that the fine and non-claim by five years should not bar the right of the college for two reasons. First, the words of the Act of 1571 are that "all leases, gifts, etc., conveyances, and estates, had, made, done, or suffered by any master and fellows, etc." So that in the case at Bar, there is a conveyance and estate "permitted or suffered by the master and fellows of the said college"; and these words shall not be extended only when the master and fellows suffer a recovery, etc., against themselves, as party thereunto, but generally according to the letter, when they suffer others to levy a fine with proclamations and suffer also five years to pass without claim, and although the conclusion of the purview of the Act is "shall be utterly void, and of none effect, to all intents, constructions, and purposes," yet by construction it shall be so taken that the fine levied with proclamation, etc., shall be void and of no effect to bind the right of the master and fellows of the house, and it would have been of no effect to have prohibited them to bar the right of their colleges by conveyances made by the master and fellows themselves, and to have left them power by their permission, or sufferance, and non-claim, to bar it. To that purpose these words, "permitted or suffered," were added. The second reason was that forasmuch as the said estate conveyed to Queen Elizabeth was of force during the life of Dr. Kelke, then master, and that he was alive at the time of the fine levied, and all

the proclamations passed in his time, so that none could have made an entry, or claim, during his life, and that Dr. Gooch, within five years after his death, did enter into the house, claiming it to be the right of him and of the fellows of the college, for these causes also it was resolved, that this entry has avoided the fine: vide 19 Hen. 8, 6; *Stowel* v. *Lord Zouch* (3), 1 Plowd. Com. 374, 376; *Croft* v. *Howel* (2), 2 Plowd. Com. 538.

As to the fourth general point, that was not thought worthy of any question, for inasmuch as the body politic in this case is a body aggregate of many, the master alone cannot, by his acceptance, divest any right or interest which is in him and his fellows, or conclude him (especially it being without deed) from entering into the house: vide 7 Hen. 7, 9 b; 9 Edw. 3, 4, 39; 18 Edw. 4, 86; 1 Plowd. Com. 91 b., etc.

Judgment for defendant.

CAMPBELL *v.* HALL

[Court of King's Bench (Lord Mansfield, C.J., Aston, Willes and Ashhurst, JJ.), Michaelmas Term, 1774]

[Reported 1 Cowp. 204; Lofft. 655; 20 State Tr. 239; 98 E.R. 1045]

Colony—Conquest by British arms—Conquered inhabitants British subjects—Prevalence of law of conquered country until alteration by conqueror—Limit of Sovereign's powers.

Per Lord Mansfield, C.J.: A country conquered by British arms becomes a dominion of the Sovereign in the right of his crown, and, therefore, subject to the Parliament of Great Britain. The conquered inhabitants, once received under the Sovereign's protection, become British subjects, and are to be universally considered in that light, not as enemies or aliens. The articles of capitulation on which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning. The law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman has no privilege distinct from the natives. The laws of a conquered country continue in force until they are altered by the conqueror. If the Sovereign without the concurrence of Parliament has power to alter the old and introduce new laws in a conquered country, this legislation being subordinate to his own authority in Parliament, he cannot make any new change which is contrary to fundamental principles, e.g., he cannot give any individual privileges not granted to his other subjects.

Notes. Distinguished: *North Charterland Exploration Co.* (1910) v. *R.* (1930), 99 L.J.Ch. 483. Considered: *Abeyeskera* v. *Jayatilake* (1931), 146 L.T. 193; *Sammut* v. *Strickland*, [1938] 3 All E.R. 693; *Liyanage* v. *R.*, [1966] 1 All E.R. 650. Referred to: *The Foltina* (1814), 1 Dods. 450; *Ruding* v. *Smith* (*Falsely called Ruding*), [1814–23] All E.R.Rep. 472; *Bedreechund* v. *Elphinstone* (1830), 2 State Tr.N.S. 379; *Cameron* v. *Kyte* (1835), 3 Knapp, 332; *Jephson* v. *Riera* (1835), 3 Knapp, 130; *Lyons Corpn.* v. *East India Co.* (1836), 1 Moo. Ind. App. 175; *Sottomayor* v. *De Barros* (*Queen's Proctor Intervening*), [1874–80] All E.R.Rep. 97; *R.* v. *Crewe*, *Ex parte Sekgome*, [1910] 2 K.B. 576; *Sabally* v. *A.-G.*, [1964] All E.R.Rep. 377.

As to the acquisition and laws of British territory overseas, see 5 HALSBURY'S LAWS (3rd Edn.) 544 et seq.; 691 et seq. For cases see 8 DIGEST (Repl.) 687 et seq.

Cases referred to:

(1) *Calvin's Case* (1608), 7 Co. Rep. 1 a; Jenk. 306; 77 E.R. 377; sub nom. *Postnati Case*, 2 State Tr. 559; sub nom. *Union of Scotland and England Case*, Moore, K.B. 790, Ex. Ch.; 8 Digest (Repl.) 766, *334*.

(2) *Craw* (*Crow*) v. *Ramsey* (1670), Vaugh. 274; 2 Vent. 1; Cart. 185; 2 Keb. 601; T.Jo. 10; 124 E.R. 1072; 2 Digest (Repl.) 202, *204*.

Action for money had and received by the plaintiff, James Campbell, owner of a plantation in the island of Grenada, against the defendant, William Hall, a collector for His Majesty of a duty of four and a half per cent. upon all goods and sugars exported from Grenada.

The action was brought to recover back a sum of money which was paid in respect of this duty upon sugars that were exported from the island of Grenada by and on account of the plaintiff, on the ground that the money was paid to the defendant without any consideration, the duty not having been imposed by lawful or sufficient authority.

When the action was tried at Guildhall, London, a special verdict was found, which stated that the island of Grenada was taken by the British arms in open war from the French king. The island surrendered upon capitulation. By art. 5 of the articles of the capitulation, it was agreed that Grenada should continue to be governed by its existing laws until His Majesty's further pleasure be known. By art. 6 it was provided that the inhabitants, being subjects of Great Britain, would enjoy their properties and privileges in like manner as His Majesty's subjects in the other British Leeward Islands.

In a proclamation under the Great Seal, bearing date Oct. 7, 1763, it was said as follows:

> "Whereas it will greatly contribute to the speedy settling our said governments, of which the island of Grenada is one, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become inhabitants thereof; we have thought fit to publish and declare by this our proclamation that we have in our letters patent under our Great Seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of the said colonies respectively that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces of America which are already under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions, as are used in our other colonies."

The next instrument stated in the special verdict was a proclamation, bearing date Mar. 26, 1764, wherein the King recited a survey and division of the ceded islands, and that he had ordered them to be divided into allotments, as an invitation to purchasers to come in and purchase upon the terms and conditions specified in that proclamation.

The next instrument stated was the letters patent under the Great Seal, bearing date April 9, 1764. In those letters there was a commission appointing General Melville governor, with a power to summon an assembly as soon as the state and circumstances of the island would admit, and to make laws with the consent of

the governor and council with reference to the manner of the other assemblies of the King's provinces in America. The governor arrived in Grenada on Dec. 14, 1764, and before the end of the year 1765 an assembly met in the island of Grenada. But before the arrival of the governor at Grenada, indeed before his departure from London, there was another instrument upon the validity of which the question raised by the case turned, which instrument contained letters patent under the Great Seal bearing date July 20, 1764. Wherein, the King, reciting that in Barbados and in all the British Leeward Islands there was a duty of four and a half per cent. upon all sugars, etc., exported, and reciting that it was reasonable and expedient and of importance to our other sugar islands that the like duty should take place in the island of Grenada, stated:

> "We have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint that from and after Sept. 29 next ensuing the date of these presents, a duty or impost of four and a half per cent. in specie shall be raised and paid to us, our heirs and successors, upon all dead commodities, the growth and produce of our said island of Grenada, that shall be shipped off from the same, in lieu of all customs and import duties hitherto collected upon goods imported and exported into and out of the said island."

This duty of four and a half per cent. was paid in all the British Leeward Islands.

Serjeant Glynn for the plaintiff.
The Attorney-General for the defendant.

LORD MANSFIELD, C.J.—The general question that arises out of all these facts found by the special verdict is whether the letters patent under the Great Seal, bearing the date July 20, 1764, are good and valid to abolish the French duties and in lieu thereof to impose the four and a half per cent. duty which is paid in all the British Leeward Islands.

It has been contended at the Bar that the letters patent are void on two points. The first is that, although they had been made before the proclamation of Oct. 7, 1763, yet the King could not exercise such a legislative power over a conquered country. The second point is that although the King had sufficient power and authority before Oct. 7, 1763, to do such a legislative act, yet before the letters patent of July 20, 1764, he had divested himself of that authority. A great deal has been said, and many authorities cited, relative to propositions in which both sides seem to be perfectly agreed, and which, indeed, are too clear to be controverted. The stating some of those propositions which we think quite clear will lead us to see with greater perspicuity what is the question upon the first point and upon what hinge it turns. I will state the propositions at large.

The first is this: A country conquered by the British arms becomes a dominion of the King in the right of his crown, and, therefore, necessarily subject to the legislature, the Parliament of Great Britain. The second is that the conquered inhabitants, once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens. The third is that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning. The fourth is that the law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives. The fifth is that the laws of a conquered country continue in force until they are altered by the conqueror. The absurd exception as to pagans mentioned in *Calvin's Case* (1) shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the Crusades. In the present

case the capitulation expressly provides and agrees that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known. The sixth and last proposition is that, if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles. He cannot exempt an inhabitant from that particular dominion, as, for instance, from the laws of trade or from the power of Parliament, or give him privileges exclusive of his other subjects. And so in many other instances which might be put. The present change, if it had been made before Oct. 7, 1763, would have been made recently after the cession of Grenada by treaty, and is in itself most reasonable, equitable, and political, for it is putting Grenada, as to duties, on the same footing with all the British Leeward Islands. If Grenada paid more it would have been detrimental to her; if less, it must be detrimental to the other Leeward Islands. Nay, it would have been carrying the capitulation into execution which gave the people of Grenada hopes that, if any new tax was laid on, their case would be the same with their fellow subjects in the other Leeward Islands.

The only question on the first point is whether the King had a power to make such change between Feb. 10, 1763, the day the treaty of peace was signed, and Oct. 7, 1763. Taking these propositions to be true which I have stated, the only question is whether the King had of himself that power. It is left by the constitution to the King's authority to grant or refuse a capitulation. If he refuses and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace. He may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.

To go into the history of the conquests made by the Crown of England. The conquest and the alteration of the laws of Ireland have been variously and learnedly discussed by lawyers and writers of great fame at different periods of time, but no man ever said that the change in the laws of that country was made by the Parliament of England. No man ever said the Crown could not do it. The fact, in truth, after all the researches which have been made, comes clearly out to be, as it is laid down by VAUGHAN, C.J., in *Craw* v. *Ramsey* (2) (Vaugh. at p. 293) that Ireland received the laws of England by the charters and commands of Henry II, King John and Henry III, and he adds an et cetera to take in Edward I and the subsequent kings. He shows clearly the mistake of imagining that the charters of 1211 were by the assent of a Parliament of Ireland. Whenever the first Parliament was called in Ireland, that change was introduced without the interposition of the Parliament of England, and must, therefore, be derived from the Crown.

MR. BARRINGTON [in his OBSERVATIONS ON THE STATUTES] is well warranted in saying that the Statute of Wales, 1281, is certainly no more than regulations made by the King in his council for the government of Wales, which the preamble says was then totally subdued. Although, for various political purposes, he feigned Wales to be a feoff of his Crown, yet he governed it as a conquest. For Edward I never pretended that he could, without the assent of Parliament, make laws to bind any part of the realm. Berwick, after the conquest of it, was governed by charters from the Crown without the interposition of Parliament until the reign of James I. All the alterations in the laws of Gascony, Guienne and Calais must have been under the King's authority because all the Acts of Parliament relative to them are extant. For they were in the reign of Edward III, and all the Acts of Parliament of that time are extant. There are some Acts of Parliament relative to each of these conquests that I have named, but none for any change of their laws, and particularly with regard to Calais, which is alluded to as if their laws

were considered as given by the Crown. Besides the garrison, there are inhabitants, property, and trade in Gibraltar. Ever since that conquest the King has made orders and regulations suitable to those who live, or trade, or enjoy property in a garrison town.

The Attorney-General alluded to a variety of instances, several very lately, in which the King had exercised legislation in Minorca where there are many inhabitants, much property, and trade. If it is said, that the King does it as coming in the place of the King of Spain, because their old constitution remains—the same argument holds here. For before Oct 7, 1763, the original constitution of Grenada continued, and the King stood in place of their former sovereign. After the conquest of New York, in which most of the old Dutch inhabitants remained, King Charles II changed the form of their constitution and political government by granting it to the Duke of York to hold of his Crown under all the regulations contained in the letters patent.

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the King has a right to a legislative authority over a conquered country. It was never denied in Westminster Hall; it never was questioned in Parliament. Coke's report of the arguments and resolutions of the judges in *Calvin's Case* (1), lays it down as clear. If a King (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom, but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament. It is plain he alludes to his own country, because he alludes to a country where there is a Parliament.

The authority also of two great names has been cited, who take the proposition for granted. In 1722 the assembly of Jamaica being refractory, it was referred to Sir Philip Yorke [later Lord Hardwicke, L.C.] and Sir Clement Wearge to know what could be done if the assembly should obstinately continue to withhold all the usual supplies. They reported thus:

> "If Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an assembly of the island, or by an Act of Parliament."

They considered the distinction in law as clear, and an indisputable consequence of the island being in the one state or in the other. Whether it remained a conquest or was made a colony they did not examine. I have on former occasions traced the constitution of Jamaica, as far as there are papers and records in the offices, and cannot find that any Spaniard remained on the island so late as the Restoration. If any, there were very few. To a question I lately put to a person well informed and acquainted with the country, his answer was that there were no Spanish names among the white inhabitants, but there were among the negroes. King Charles II by proclamation invited settlers there, he made grants of lands, he appointed at first a governor and council only, afterwards he granted a commission to the governor to call an assembly. The constitution of every province, immediately under the King, has arisen in the same manner, not from grants, but from commissions to call assemblies, and, therefore, all the Spaniards having left the island or been driven out, Jamaica from the first settling was an English colony, belonging to the King in right of his Crown like the cases of the islands of St. Helena and St. John mentioned by the Attorney-General. A maxim of constitutional law as declared by all the judges in *Calvin's Case* (1), which two such men in modern times as Sir Philip Yorke and Sir Clement Wearge took for granted, will require some authorities to shake.

On the other side, no book, no saying, no opinion has been cited, no instance in any period of history produced, where a doubt has been raised concerning it. Counsel for the plaintiff no doubt laboured this point from a diffidence of what might be our opinion on the second question. But on the second point, after full consideration we are of opinion that before the letters patent of July 20, 1764, the

King had precluded himself from the exercise of a legislative authority over the island of Grenada. The first and material instrument is the proclamation of Oct. 7, 1763. See what it is that the King there says, with what view, and how he engages himself and pledges his word.

> "For the better security of the liberty and property of those who are or shall become inhabitants of our island of Grenada, we have declared by this our proclamation that we have commissioned our governor (as soon as the state and circumstances of the colony will admit) to call an assembly to enact laws . . ."

With what view is this made? It is to invite settlers and subjects, and why to invite? That they might think their properties, etc., more secure if the legislation was vested in an assembly than under a governor and council only.

Having established the constitution, the proclamation of Mar. 20, 1764, invites them to come in as purchasers. In further confirmation of all this, on April 9, 1764, three months before July, an actual commission is made out to the governor to call an assembly as soon as the state of the island would admit thereof. You observe there is no reservation in the proclamation of any legislature to be exercised by the King or by the governor and council under his authority in any manner, until the assembly should meet. Rather the contrary, for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being and by courts of justice, not by a legislative authority until an assembly should be called. There does not appear from the special verdict any impediment to the calling an assembly immediately on the arrival of the governor, which was in December, 1764. But no assembly was called then or at any time afterwards until the end of the year 1765.

We, therefore, think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who were or should become inhabitants, or who had or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council in like manner as the other islands belonging to the King. Therefore, though the abolishing the duties of the French king and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward Islands, is just and equitable with respect to Grenada itself and the other British Leeward Islands, yet, through the inattention of the King's servants in inverting the order in which the instruments should have passed and been notoriously published, the last act is contradictory to and a violation of the first, and is, therefore, void. However, proper it may be in respect to the object of the letters patent of July 20, 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, "it can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain." The consequence is, judgment must be given for the plaintiff.

ATTORNEY-GENERAL (ON RELATION OF UNIVERSITY COLLEGE, OXFORD) *v.* WHORWOOD

[Lord Chancellor's Court (Lord Hardwicke, L.C.), August 2, 1750]

[Reported 1 Ves. Sen. 534; 27 E.R. 1188]

Equity—Performance of obligation—Presumption—Act by obligee capable of being means of performing obligation—Covenant to settle land.

A person under an obligation who does an act which can be the means of performing the obligation is presumed in equity to have done the act with that intention. So, where a person covenants to purchase and settle land and afterwards purchases land suitable to be the subject of the settlement, but does not settle it, it will be presumed that he purchased the land with the intention of performing his covenant.

Charity—Education—Devise to college—Advancement of purpose—Augmentation of foundation—Foundation of fellowship.

The establishment of learning is a charity, and a devise to the college of a university generally for its benefit, to increase the foundation and advance the end of the institution, to augment a headship or fellowship, or found a new one, is a charitable gift.

Charity—Practice—Parties—Attorney-General—Enforcement of trust for benefit of college.

In an action to enforce a charitable trust for the benefit of a college of a university the Attorney-General is a necessary party at the relation of the college, but, if the trust is not charitable, on a general devise to the college without more the college, being a body capable of taking, must sue in its own name.

Notes. As to the equitable doctrine of performance and educational charities, see 14 Halsbury's Laws (3rd Edn.) 609–611 and ibid., vol. 4, pp. 218–221. For cases see 20 Digest (Repl.) 521 et seq.; 8 Digest (Repl.) 326–331.

Cases referred to:

(1) *A.-G.* v. *Oakaver* (1736), cited in 1 Ves. Sen. 536; 27 E.R. 1189, L.C.; 8 Digest (Repl.) 334, *144.*

(2) *A.-G.* v. *Baxter* (1684), 1 Vern. 248; reversed sub nom. *A.-G.* v. *Hughes* (1689), 2 Vern. 105; 23 E.R. 677; 8 Digest (Repl.) 335, *166.*

(3) *Countess Cowper's Case* (circa 1720), cited 3 Atk. 393; cited 1 Ves. Sen. 539; 26 E.R. 1026; 27 Digest (Repl.) 154, *1117.*

(4) *Wilcocks* v. *Wilcocks* (1706), 2 Vern. 558; 23 E.R. 961; 20 Digest (Repl.) 522, *2337.*

(5) *Roundell* v. *Breary* (1704), 2 Vern. 482; 2 De G. & J. 319, n; 23 E.R. 909; 20 Digest (Repl.) 317, *549.*

(6) *Wilks* v. *Wilks* (1730), 2 Eq. Cas. Abr. 35; 5 Vin. Abr. 293; 22 E.R. 30; 20 Digest (Repl.) 523, *2357.*

(7) *Tooke* v. *Hastings* (1689), 2 Vern. 97; 23 E.R. 671; 20 Digest (Repl.) 522, *2336.*

(8) *Deacon* v. *Smith* (1746), 3 Atk. 323; 26 E.R. 988; 20 Digest (Repl.) 522, *2345.*

(9) *Lechmere* v. *Lady Lechmere* (1735), Cas. temp. Talb. 80; 2 Eq. Cas. Abr. 31, 501; 25 E.R. 673; sub nom. *Lechmere* v. *Earl of Carlisle*, 3 P.Wms. 211, L.C.; 20 Digest (Repl.) 356, *824.*

Information by the Attorney-General at the relation of University College, Oxford, to enforce a charitable trust.

Captain Thomas Whorwood on his marriage with a daughter of Sir Nicholas Waite, being entitled to receive a large portion with her, agreed that it should be settled for her benefit for life, and afterwards, if no children, it was to come to

himself. Afterwards on the death of a sister an accession of fortune came to Mrs. Whorwood to arise by the sale of her father's estate which was vested in trustees who were to raise certain sums of money out of the estate and to divide the residue among his three daughters. Mrs. Whorwood joined in levying a fine for a sale of this estate. Henry Halsey, a trustee in the marriage articles, who had married the third daughter, acted in the sale and received the whole purchase-money, not only his wife's share, but also that of Mrs. Whorwood. Captain Whorwood gave a receipt to Halsey for his part of the purchase-money paid for the estate which he thereby promised and agreed to lay out pursuant to the trust reposed in Halsey. By his last will he devised the remainder of his real and personal estate to University College, Oxford, and by a codicil annexed particular regulations, viz., that, if there was a senior fellow of the college, who must be a divine, of the age of forty, in all respects of good repute, he should be the possessor of all his estate and the furniture of his house at Denton, to keep it in repair, not to fell timber without the consent of the college, to live in his house hospitably and sometimes to give entertainment to the poor, to distribute cordials and drugs to them when needful, to give to them some books and pamphlets of good morals and piety, and to give an annual entertainment to the fellows. If he proved dissolute, the election was to be void and another proceeded to.

On the information at the relation of the college it was argued that a devise to a college generally was always considered as a proper charitable disposition because they were bodies of universal extent and benefit to mankind. The devise was, therefore, on the most valuable consideration. What followed were only regulations by the testator, in which, if any difficulty, they might be settled by proper authority, and although some of them were absurd, that would not make the devise to the college void. The direction for taking care of the poor, being confined to a particular district, was not like Colonel Norton's will which was to take care of the poor and lame, halt [crippled] and blind in general. This being now established to be a valid will in point of law, the particular directions and regulations would not make it void.

Against this it was argued that this was not a devise to a charity or to a superstitious use. Was this such a sort of use as ought to be established by a court of equity for ever? The Charitable Uses Act, 1601 [repealed by Mortmain and Charitable Uses Act, 1888] made good devises to colleges upon an encouragement for learning. If this was a devise of that nature, it would be within that statute, which defined what would be a charitable use. Although some uses not exactly within those words have been determined within the statute, as the leaving money or an estate for maintenance of a preacher (which from its own nature was so, as for the propagation of religion), yet they were very few, for other purposes had been endeavoured to be brought within it, which had been refused: 2 Vern. 487, and some uses that were indifferent in themselves or for benefit of mankind in general: 2 Salk. 605. Although this was to the college and the estate vested in it, it was not for the benefit thereof in general as a body, but for particular purposes in the annexation to his codicil which he called his regulations which was only giving his estate in mortmain to a person to live on it in the manner the owner should have done. The duty was to be beneficial to the poor in some, not in any certain, degree. To live hospitably was the duty of everyone who had a good estate. He was to continue still a senior fellow and not to do any act which would avoid his fellowship, in this college celibacy was required and residence whereas the nature of this institution was to draw him from the college, which was not for the benefit of learning within the statute of 1601, nor had it any tendency to religion. The only thing having a turn towards charity was the entertainment of the poor, which was not an act of charity (although relieving their necessities was), but rather luxury. Besides, it was only to be done sometimes, quite unlimited. The adding of a tincture of charity merely to make that good which otherwise would be void, would not do. There was, indeed, a clause in the

will which might be interpreted to be a devise of the advowson of the college and the estate given in augmentation of the advowson. The clause was

> "in case of vacancy by death or otherwise, the next successor should officiate as parish-minister, and so on from one to the other."

The general word "estate" would, indeed, carry the advowson, but the testator only meant a voluntary officiating until the living was filled. He was never named in the will incumbent of the living, but possessor of this estate. The trust was to take effect immediately on the death of the testator's wife, whether it was then vacant or not. If he proved dissolute, the college was to deprive him, but by augmenting a living a power of deprivation could not be given to any other than the bishop of the diocese. The will might be void for the uncertainty in the method of election. When a man would settle his estate in this odd, whimsical way, the court ought not to establish it. It was locking up property, which was against the policy of the law of England. The court had refused carrying into execution a particular turn of mind, although it was not a superstitious or illegal, but an indifferent, use, as to feed sparrows, etc., especially as this was for ever. It would be a reproach to a court of justice and the policy of the nation to suffer keeping up for ever a trust for such a purpose as that or as this, which is only a charity ad bibendum et edendum. In *A.-G.* v. *Oakaver* (1), the MASTER OF THE ROLLS established a stipend given to keep up an organ and for the organ, but as to £40 a year to the choristers he refused it. On appeal your Lordship affirmed the decree as choristers never were allowed in parochial churches.

[**LORD HARDWICKE, L.C.,** said that what he went on was that it was contrary to the constitution of the Church of England to have them in parochial churches. They would be under no rule of government as they were in other churches, and the law would not allow that they should be under the government of the heir-at-law.]

If this was not a charitable or public, but a superstitious, use, it resulted to the heir-at-law, Sir James Markham. The legal estate vested in the college, but a corporate body could be a trustee. Superstitious uses went to the King, not for the benefit of the Crown, but to dispose of them to other charitable uses of the like nature. Their vesting in the Crown was from their being all good uses as religion stood before the Reformation, but that was the case only where it was really a superstitious use, for where it was an improper or illegal use, as this, it was void, and vested not in the Crown, as in the case of *Oakaver* (*A.-G.* v. *Oakaver* (1)) who enjoyed the land free from the £40 a year, the court not directing it to be given to the Crown.

LORD HARDWICKE, L.C.—If this trust is not a charity, there is no ground for the information in the name of the Attorney-General at the relation of the college on a devise to the college only, for such information can only be supported on the foot of a charitable use. On a general devise to the college without more the college, being a body capable of taking, must sue, the Attorney-General having nothing to do with it.

As to the trust created by these regulations on the devise to the college, I will give no opinion at present. It is a matter deserving consideration, and shall come before the court on all the circumstances of the case. The establishment of learning is a charity, and so considered on the statute of Elizabeth [Charitable Uses Act, 1601]. A devise to a college generally for their benefit, to increase the foundation, and advance the end of the institution, to augment a headship or fellowship, or found a new one, is a laudable charity, and deserves encouragement. This, however, is not a devise of that kind for academical, collegiate purposes. It is only to establish somebody to live at his house at Denton for ever and to make his estate inalienable, answering no good to the college or the public so far as it appears at present. It is necessary, therefore, for the court to consider materially what may be the effect and operation thereof, how far it is good in itself, and, if

not, what may be the consequence of it as to any power in the Crown to give direction to the uses of a charity improperly provided for in itself as was done in *A.-G.* v. *Baxter* (2), where Lord North held that the trust did not result to the heir-at-law, the Crown having power to direct in what manner it should go, and it was directed to Chelsea College. On a re-hearing (before which the Act of Toleration [1688] was passed) the court held that the charitable use was not contrary to law and reversed the decree. But nothing was said against Lord North's opinion that the power of directing came to the Crown, if the trust was not supportable as a charitable use. But this I will not determine now, it fully deserving consideration, and it is necessary to know the effect of the devise itself, how far the direction for fixing a senior fellow and providing for him in this manner is inconsistent with the constitution of the college as to residence, etc., for, if so, it is contrary to the intent of this trust which was that he should be a continuing fellow of the college, not barely when he is elected. A point will arise, if this is not a good charitable use within the Charitable Uses Act, 1601, whether it will stand as a devise to the college generally. It will be to a body capable of taking, which will depend on the power they have to take in mortmain, and it is necessary to be inquired into how far they can do so that the whole may be before the court when the trust comes to be determined. The Master, therefore, must inquire into that, and whether the regulations are inconsistent with the college statutes, and reserve the consideration of the validity and operation of the trust until after the report.

The next consideration related to Mrs. Whorwood, the testator's widow, principally as to what was to be laid out for her benefit under the marriage articles or under any agreement of the husband. She by her cross-bill demanded, not only to have a settlement on her for life of the estate at Denton, which had not yet been settled according to the articles, but also to have the lands and tenements purchased with the share she was entitled to out of her father's estate (which was agreed by the articles to be settled) and also that share which came to her on the death of her sister, so settled, insisting that by the note her husband gave to Halsey, there was a declaration of trust, or at least an engagement binding him and all claiming voluntarily under him that the whole money should be laid out according to the trust in those articles. It extending to the whole, there was some consideration for it. It was a reasonable act. If he had come to have a sale of that trust estate and the share arising from the sale belonging to his wife paid to himself, the court would not have let him have it if the wife or her friends had insisted that there was a narrow provision made on her on the marriage, and, therefore, a further settlement should be made.

This was not opposed as to her father's lands, but it was insisted that she was not entitled to have the benefit of the other part arising from her sister's death by settling it in like manner, because it was not within the articles, nor was there sufficient proof of any such agreement extended to that as would bind those in his place, nor was it sufficiently put in issue if there was any new agreement for that, the bill putting in issue only the articles and the rights arising under them, and nothing of this note. It is to be confined to trusts in the articles. The wife levied a fine before the money came into the hands of the trustee. Then the money coming in lieu of the estate is absolutely the husband's, and the court will not suffer the person into whose hands it comes to retain it and say a settlement should be made on the wife.

It has unfortunately happened that the affection which at first subsisted between the husband and wife did not continue and she has been hardly used, which, although it will not alter the justice of the case, is a reason that things should not be taken against her in a strict, harsh construction. The note is not strictly put in issue, but sufficiently for this purpose, and it would be to no purpose to put this off on any such defect so as to require a supplemental bill if I should be clear in the point of right, as I am. Although there is no particular charge in the

bill, yet in the interrogatory part there are questions relating to it, whether testator did not by some note acknowledge that he received the money and agreed to lay it out in this manner. The rule is, you are not only to question in the interrogatory part, but make charges in the charging part. Otherwise you cannot except, but the defendant, although not bound to answer to it, has done so, which being replied to, it is put in issue properly. Consequently, that informality in the manner of charging (for it is no more) is supplied by the answering to it, for a matter may be put in issue by the answer as well as by the bill, and, if replied to, either party may examine to it. Which brings it to the question of right, and I am of opinion that this note is sufficient to bind the testator, his representatives, and the claimants under his will, to a performance of what is there agreed to. A man may as between himself and his wife make an agreement or declaration of trust in his life, which although not for valuable consideration, shall take effect as against his executor or administrator or those claiming voluntarily and in representation under him, of which there are several cases. In a case relating to Lady Cowper's estate, before Sir Joseph Jekyll, M.R. [*Countess Cowper's Case* (3)], several gifts of that kind by Lord Cowper in his life were established to belong to her and to pass by her will, although they could not take effect against creditors, yet they should take effect unless there was some imperfection in the instrument in point of law, which there is not in the present case.

As to the construction and extent of the note, I think it was a reasonable act for him to do, and it is truly insisted that on his application for the money the court would undoubtedly have ordered a further settlement. If they did not come into court, but acted among themselves, and the husband has agreed to do that which the court would have directed, had the wife insisted on it in a proper suit, it should have its full effect. Although it does not appear in the cause that the wife had levied a fine before this money came into the hands of the trustee, as it is said, yet that must be to satisfy the purchaser as she was married, but I will not divide one act from the other, but take all as one transaction, and that this note, although subsequent, is evidence of what was the agreement and intent, viz., that this money should be laid out in purchase of land to be settled to the same uses. The circumstances warrant that construction, the trustee in the marriage articles being the proper person to intervene and receive the money arising by sale of that other share, and to see the articles performed for her benefit. He receives the whole, the husband coming to receive it out of his hands, it is on such a promise, which is evidence of the terms on which the money was paid to him and of the agreement and intent on which the wife joined in the fine for sale of this estate. It was reasonable and what the court would have obliged him to had he come before it, for that is the distinction. If the husband can lay hold of the wife's estate without aid of a court of equity, the court will not compel him to do so as they will where he cannot without such aid, which is the present case. The sum is particularly ascertained and includes both shares, as well that which arises on her sister's share as her original share, and the promise is to lay out the whole of that sum, which, therefore, I am of opinion must be laid out pursuant to the trust.

Another question was made as to some lands purchased by the testator after marriage, but never settled, whether they should not be considered as a performance of the covenant he was under to purchase land and settle it on her for life, it being insisted on as a rule that where one is under covenant to settle lands, or to purchase and settle, if he leaves lands in their nature proper (for a reversion will not do) which were his former estate, and descend after his death, or if he purchases, and does not settle, it will be considered (unless evidence to the contrary) pro tanto, or in the whole, a performance of the covenant, and purchased with that view, not on the head of satisfaction but performance. Otherwise it would cause great confusion in families. This has been before the court several times, first in *Wilcocks* v. *Wilcocks* (4); *Roundell* v. *Breary* (5); *Wilks* v. *Wilks* (6) by Lord Harcourt; a case before Your Lordship on Mr. Parsons's will (cited 1 Ves. Sen. at p. 2); and *Tooke* v. *Hastings* (7), for which Your Lordship searched

the Register 515, where there was a bond to charge lands of £100 with £80 a year to his daughters, the obligor died, having two manors, without doing it; and the court held that one manor (not appearing whether purchased before or not) should be liable. If that manor was purchased after, it is very strong. Lastly *Deacon* v. *Smith* (8), where first there was a demurrer, and Your Lordship had a doubt whether *Lechmere* v. *Lady Lechmere* (9) had not gone pretty far, but was afterwards satisfied on the bill of review. It was an agreement between the husband and trustees. Smith, in consideration of £400 portion agreed to convey and settle houses, lands and tenements or a rentcharge issuing thereout to himself for life, to his wife for life in bar of dower, to the heirs of his body upon her, in default of such issue to the right heirs for ever, subject to a power to charge for younger children. After marriage he never made any settlement of the land or rentcharge, but purchased several little pieces of land, one a piece of freehold of inheritance, another a reversion dependant on a life. The question was whether these purchases at different times and small parcels, and some reversions (whence it was argued that he could not intend them in performance of the covenant) were a performance, or whether the covenant should be made good out of his assets. Your Lordship mentioned all the authorities, particularly *Lechmere* v. *Lady Lechmere* (9), and held that the purchases should be taken as an intended performance, and that those lands should be so settled. It was objected that this would be affecting these estates as liens, which would follow them into the hands of purchasers or mortgagees. The answer of the court was that this depended on the intent, and the presumption stood that he intended a performance, until the contrary was proved, but any act showing he had not that in view, as a mortgage or sale afterwards, would take off the presumption. This was given up on the other side as *Lechmere* v. *Lady Lechmere* (9), and the cases cited were too strong, that if a person, obliged under articles to purchase and does purchase although not to the extent the articles require to make it good, so far as it can be applied it will be.

LORD HARDWICKE, L.C.—It being admitted that the freehold estates purchased will be so applied: they must be settled on the widow for life. As to the purchases prior to the last will, they will pass thereby; as to those subsequent, after the widow's estate for life the reversion will descend to the heir, but there are some copyholds purchased by the husband which, not being surrendered to the use of the will, in point of law descend. These cannot be applied to satisfy these articles. I do not know that on a general covenant to purchase the court has taken copyhold lands (unless there was some agreement for that purpose) to go to make good articles in this manner, being liable to different tenures and to forfeiture. Unless, therefore, they pass by the will, they descend, which will depend on the penning of the will; and bring it to the question of the charitable use, for if it is such, it will be good by way of appointment. Yet I do not know any case where they have been made good as an appointment for benefit of a remainderman. It depends on whether there are sufficient words to take in copyhold lands. They are not mentioned; it is a general devise of real and personal estate, under which devise there is no instance that copyhold shall pass if there is freehold to answer it, unless perhaps for creditor. But it must be inquired into to know when these copyhold lands were purchased before I can determine that.

Let the Master also inquire what freeholds were purchased after the marriage, and let what the testator paid for them be accepted and settled in lieu and satisfaction of so much of what the widow is entitled to. Let the residue be considered as a debt on the testator's estate to be laid out in purchase of lands and settled for her jointure, the remainder in fee to the two senior Six Clerks, not towards the cause (a method which has been sometimes taken), for the benefit of the person who shall appear entitled. Let the widow have interest at 4 per cent. for such money as ought to have been laid out from her husband's death. As to the costs at law, the devisee is not entitled to costs against the heir. There are several cases where

an heir-at-law disputes a will both in law and equity and yet shall have his costs, and this is a very proper case for it. As to the widow, I do not think it was improper for her to dispute the will. All parties, therefore, should have costs to this time out of the estate, but not to give her costs at law, yet I will not make her pay costs.

DUKE OF MARLBOROUGH *v.* LORD GODOLPHIN AND OTHERS

[Lord Chancellor's Court (Lord Hardwicke, L.C.), November 26, 1750]

[Reported 2 Ves. Sen. 61; 28 E.R. 41]

Power of Appointment—Exercise—Appointment by will—Time of taking effect—Death of testator.

A power of appointment exercised by will takes effect as from the death of the testator and not as from the date of the will, for the exercise of the power is a testamentary act which is only inchoate during the life of the testator from whose death only it receives perfection. Consequently, if the person who is the object of the power dies before the testator the appointment will lapse and the power cannot be exercised in favour of his representatives.

Will—Construction—Transposition of words—Giving effect to will otherwise void—Attainment of testator's intention—No transposition to alter meaning or let in different beneficiaries.

Per Lord Hardwicke, L.C.: To make sense of a will which is otherwise insensible and to make it have some effect rather than be totally void the court will transpose words to attain the intent that on the face of the will the testator had, but in no case where the words are plain and sensible is a transposition made in order to create a different meaning and construction, much less to let in different devisees and legatees, which is a very different case from where the persons to take are certain and the only question concerns the construction of the words to create the limitation or interest to be taken.

Notes. Section 5 of the Statute of Frauds, 1677, which provided for the form of wills of land, was repealed by the Wills Act, 1837 (26 Halsbury's Statutes (2nd Edn.) 1326). Section 7 of the Statute of Frauds, providing that declarations of trusts of lands should be in writing, has been replaced by s. 53 (1) (b) of the Law of Property Act, 1925 (20 Statutes 427). Copyhold tenure was abolished by the Law of Property Act, 1922: see 8 Halsbury's Laws (3rd Edn.) 340.

Considered: *Tenynham* v. *Webb* (1751), 2 Ves. Sen. 198; *Southby* v. *Stonehouse* (1755), 2 Ves. Sen. 610. Applied: *Robinson* v. *Hardcastle* (1788), 2 Term Rep. 241. Considered: *Brown* v. *Higgs*, [1803–13] All E.R.Rep. 146; *A.-G.* v. *Pickard* (1838), 3 M. & W. 552; *Burrough* v. *Philcox*, *Lacey* v. *Philcox* (1840), 5 My. & Cr. 72. Doubted: *Salusbury* v. *Denton* (1857), 3 K. & J. 529. Not followed: *Re Caplin's Will* (1865), 2 Drew. & Sm. 527. Considered: *Pockock* v. *A.-G.* (1876), 3 Ch.D. 342. Doubted: *Wilson* v. *Duguid* (1883), 24 Ch.D. 244. Applied: *Re Bowles*, *Page* v. *Page*, [1905] 1 Ch. 371. Referred to: *Jenkins* v. *Quichant* (1800), 5 Ves. 596, n.; *Hawkins* v. *Kemp*, [1803–13] All E.R.Rep. 506; *Foley* v. *Parry* (1833), Coop. temp. Brough. 219; *Re Vizard's Trusts* (1866), 1 Ch. App. 588; *De Serre* v. *Clarke* (1874), 43 L.J.Ch. 821; *Re Dowsett*, *Dowsett* v. *Meakin*, [1901] 1 Ch. 398; *Re Moses*, *Beddington* v. *Beddington*, [1902] 1 Ch. 100; Muir (or *Williams*) v. *Muir*,

[1943] A.C. 468; *Re Dowie's Will Trusts, Barlas* v. *Pennefather*, [1949] 1 All E.R. 968; *Re Wills' Trust Deeds, Wills* v. *Godfrey*, [1963] 1 All E.R. 390.

As to when the exercise of a power takes effect, see 30 HALSBURY'S LAWS (3rd Edn.) 263–266, and as to lapse of testamentary gifts and the construction of wills see, ibid., vol. 39, 938 et seq. For cases see 37 DIGEST (Repl.) 267–272, 326 et seq., and 48 DIGEST (Repl.) 362 et seq., 390 et seq.

Cases referred to:

(1) *Luxford* v. *Cheeke* (1683), 3 Lev. 125; 83 E.R. 611; sub nom. *Brown* v. *Cutter*, T.Raym. 427; 48 Digest (Repl.) 464, *4183.*

(2) *Daniel* v. *Uply* (1626), Lat. 9, 39, 134; W.Jo. 137; Noy, 80; 82 E.R. 248, 264, 312; sub nom. *Danyel* v. *Ubley*, Benl. 178; 37 Digest (Repl.) 248, *108.*

(3) *Mariot* v. *Kinsman* (1631), Cro. Car. 219.

(4) *Brett* v. *Rigden* (1568), 1 Plowd. 340; 75 E.R. 516; 48 Digest (Repl.) 370; *3205.*

(5) *Hele* v. *Bond* (1717), Prec. Ch. 474; 24 E.R. 213; sub nom. *Heli* v. *Bond*, 1 Eq. Cas. Abr. 342, H.L.; 37 Digest (Repl.) 350, *909.*

(6) *Kibbet* v. *Lee* (1619), Hob. 312; 80 E.R. 455; 40 Digest (Repl.) 592, *955.*

(7) *Burnet* v. *Helgrave* (1700), 1 Eq. Cas. Abr. 296; 21 E.R. 1057; 37 Digest (Repl.) 332, *768.*

(8) *Oak* v. *Heath* (1748), 1 Ves. Sen. 135; 27 E.R. 940, L.C.; 37 Digest (Repl.) 333, *779.*

(9) *Davers* v. *Dewes* (1730), 3 P.Wms. 40; 24 E.R. 961, L.C.; 48 Digest (Repl.) 633, *6089.*

Also referred to in argument:

Clere's Case (1600), 6 Co. Rep. 17 b; Jenk. 260; 77 E.R. 279; sub nom. *Cleer* v. *Parker*, Cro. Eliz. 877; sub nom. *Parker* v. *Clere*, Moore, K.B. 567; sub nom. *Clere* v. *Parker*, Cro. Jac. 31; 37 Digest (Repl.) 324, *713.*

Longford v. *Eyre* (1721), 1 P.Wms. 740; 24 E.R. 593, L.C.; 37 Digest (Repl.) 274, *300.*

Wagstaff v. *Wagstaff* (1724), 2 P.Wms. 258; 24 E.R. 721, L.C.; 47 Digest (Repl.) 96, *689.*

Ross v. *Ewer* (1744), 3 Atk. 156; 26 E.R. 892, L.C.; 37 Digest (Repl.) 265, *230.*

Tylle v. *Pierce* (1634), Cro. Car. 376; 79 E.R. 927; 37 Digest (Repl.) 274, *311.*

Maddison v. *Andrew* (1747), 1 Ves. Sen. 57; 27 E.R. 889, L.C.; 37 Digest (Repl.) 310, *602.*

Wheddon v. *Oxenham* (1731), 2 Eq. Cas. Abr. 546; 22 E.R. 460; 49 Digest (Repl.) 1050, *9825.*

Webster v. *Webster* (1726), 2 P.Wms. 347; 24 E.R. 759; 49 Digest (Repl.) 897, *8402.*

Cray v. *Willis* (1729), Mos. 184; 2 P.Wms. 529; 25 E.R. 339; 48 Digest (Repl.) 382, *3309.*

Mason v. *Limbury* (1735), cited in Amb. at p. 4; 2 Ves. Sen. at p. 67; 47 Digest (Repl.) 49, *330.*

Harding v. *Glyn* (1739), 1 Atk. 469; cited in 5 Ves. at p. 501; 26 E.R. 299; 47 Digest (Repl.) 46, *303.*

Jones v. *Westcomb* (1711), Prec. Ch. 316; Gilb. Ch. 74; 1 Eq. Cas. Abr. 245; 24 E.R. 149; 49 Digest (Repl.) 1115, *10,355.*

Fonnereau v. *Fonnereau* (1745), 3 Atk. 315; 26 E.R. 983, L.C.; 48 Digest (Repl.) 37, *245.*

Digges's Case (1600), 1 Co. Rep. 173a.

Albany's Case (1586), 1 Co. Rep. 110 b; 76 E.R. 246; 37 Digest (Repl.) 395, *1265.*

King v. *Melling* (1671), 1 Vent. 225; 86 E.R. 151; on appeal, 1 Vent. 232, Ex. Ch.; 48 Digest (Repl.) 398, *3454.*

Bainton v. *Ward* (1741), 2 Atk. 172; cited 2 Ves. Sen. at p. 2; 7 Ves. 503, n.; 26 E.R. 507, L.C.; 23 Digest (Repl.) 533, *5981.*

Lord Townshend v. *Windham* (1750), 2 Ves. Sen. 1; 28 E.R. 1, L.C.; 37 Digest (Repl.) 339, *832.*

Tomlinson v. *Dighton* (1712), 1 P.Wms. 149; 24 E.R. 335; sub nom. *Thomlinson* v. *Dighton*, 10 Mod. Rep. 31, 71; 1 Salk. 239; 37 Digest (Repl.) 251, *140.*

Capel's Case, *Hunt* v. *Gateley* (1593), 1 Co. Rep. 54 a; Moore, K.B. 154; Poph. 5; 76 E.R. 121, Ex. Ch.; 38 Digest (Repl.) 858, *709.*

Wood's Case (1561), cited in 1 Co. Rep. 99 a.

Bill claiming legacies under a will.

In 1720 Charles, Earl of Sunderland, made his will whereby he disposed of his pictures and furniture at his house, desired his debts and legacies might be paid, and gave £30,000 to his wife, and after several other pecuniary legacies gave all the rest and residue of his personal estate to his eldest son Robert Lord Spencer,

> "except such other legacies as I shall endorse on the back hereof, in nature of a codicil in my own handwriting."

He made Lord Godolphin and others executors of the will. Afterwards, by an undated codicil endorsed on his will he directed that the legacy given by his will to his wife should be to her own use and benefit for and during the term of her natural life only, and after her decease should be divided and distributed to and among such of his children, and in such manner and proportion as she by any deed, will, or instrument in writing in the nature of a will should direct and appoint, and for no other purpose whatsoever. He died in 1722 without revoking the will, leaving his countess and seven children.

Upon the second marriage of the countess a deed of settlement was made wherein was an express recital of the will and codicil and a declaration that the interest of the £30,000 should remain to her separate use, and then an express covenant and agreement on the part of her second husband that she should have power to make a will concerning the interest and improvement of that sum. In 1736, her second husband then living, she made a will thereby reciting that she had before appointed £6,000, part of the £30,000, for the benefit of her son Lord Robert, and £2,000, other part thereof, for her daughter Lady Morpeth, which she intended as part of what she proposed to give her at her death. She said that in pursuance of her power and authority given by the will of her husband and of all other powers, she gave, directed and appointed the remaining principal sum to be paid to the several children of Lord Sunderland after mentioned in the following proportions: to the plaintiff £2,000, to John Spencer £2,000, to Lady Bateman, £3,000, and the residue, which she computed to be £15,000 to Lady Morpeth on condition that Lady Morpeth should give such a release as should be tendered by her executors within six months after her (the countess's) death and discharge all her estate real and personal from the said £30,000, in default thereof the legacy being appointed for her should be void. She made Mrs. Poultney her executrix, and died in 1749. John Spencer and Lady Morpeth died in her lifetime after her making this will. Their legacies were claimed by the plaintiff as being thereby lapsed as undisposed and unappointed, and, therefore, part of the residuary estate of Robert, whose executor the plaintiff was. Under this right the plaintiff applied to Lord Godolphin, the surviving executor of Lord Sunderland, for the payment of those sums, and he thought proper to refer it to this court to settle the several claims set up by the several defendants to this money.

The bill, therefore, to have £17,000 remainder of the £30,000, beyond those sums which were effectually appointed and given by Lady Sunderland by virtue of her power, was brought against the representative of Lord Sunderland and of Lady Sunderland to whom also administration had been granted to William Spencer, younger son of Lord Sunderland who died soon after his father. There were also made parties Lady Bateman as one of the children, Lord Carlisle as administrator of his late wife Lady Morpeth, the Duke of Bedford as administrator of his late wife another of the daughters, and also the representatives of John Spencer.

LORD HARDWICKE, L.C.—As I am satisfied as to what decree I ought to make, it is not proper to put it off merely for the sake of putting my thoughts into better order and method.

The general question who has a right to these two sums of £2,000 and £15,000 (as it is computed) appointed by the will of Lady Sunderland, made in execution of a power given by the will of her husband, depends on three considerations: (i) whether the representatives of Lady Morpeth and of John Spencer, who died in the life of Lady Sunderland, can be entitled to these two sums respectively; (ii) if they cannot, whether these two sums will fall into the residue of the testator's personal estate or accrue and belong to all the children and the representatives of such as are dead; (iii) if they should belong to the children of the testator, then to what species or division of these children, whether to all such as were living at the testator's death and the representatives of those dead, or only to those two surviving at the death of Lady Sunderland.

The first question depends on two things. First, on the power and construction of the power given by the will of testator; next, upon the act done in execution of that power. As to the first, the testator gave the residue of his personal estate so as to show an intent to dispose of his whole personal estate. As it stood in the will, it was an absolute legacy of £30,000 to the wife. By a writing endorsed on the will, called a codicil, but with no new date (and, therefore, it may be considered as part of the will) the testator restrains that general legacy to one for life only with power to dispose of it, which is the same as if the whole had been inserted in the will. This power is undoubtedly as large as the testator could possibly give to her as to the instrument by which she was to execute, but not large in respect of the objects as to whom she is restrained to and among the children. One side contends that here is no gift by the codicil but to the wife for life with a power. The other, that a gift is made to all the children of testator, subject to the power of Lady Sunderland by such an instrument as is described to divide and distribute among them so as to exclude some if she pleased, but, if not, that still there is a gift to the children. That last, however, is not the construction of the codicil.

What was the intent of testator in giving this legacy and power can only be collected from the words of the will and the codicil, and it is plain from both that his primary intent was to provide for the wife thereby. To secure the respect and duty of the children to her, he restrains her estate, but gives it to none but to such as she should appoint. It is admitted that, if taken according to the words, to make any of the children take there must be an appointment, but the method taken for the defendants to make this a gift to the children is by insisting that to make this presumed intent of the testator take effect the words may be transposed. Suppose the word "such" was transposed, I cannot see how it will vary the sense or construction of this clause, for the sense and meaning would be the same, restraining the generality of the former words, making it a gift only to such as she should appoint. There is no colour to make such a transposition. It is true that a court of law as well as of equity (and a court of equity has no greater latitude in construction of wills, and transposing the words thereof, than a court of law has) will, to make sense of a will otherwise insensible, and to make it take some effect rather than be totally void, often transpose words to attain the intent that on the face of the will the testator had. This was *Luxford* v. *Cheeke* (1), where the court did not make the transposition to let in more or defeat the devisees (which in no case do I know that the courts have done), but it was to make the limitation sensible, the words being insensible, and to attain the meaning, but in no case where the words are plain and sensible is a transposition made in order to create a different meaning and construction, much less to let in different devisees and legatees in a will, which is a very different thing from the case where the persons to take are certain and the question is only concerning the construction of the words to create the limitation or interest to be taken.

These [in the present case] are plain words. There is no designation to take under this will but such of the children as she should appoint, and no person can

be ascertained under this will until she has made such appointment. Indeed, the words want no construction, and if the court should put a different construction and transpose, as is contended for the defendants (which still could not do for them), it would be making a new will, for the testator intended that none of the children should take but from the appointment of Lady Sunderland. In this it is like the case cited out of LATCH 10 [*Daniel* v. *Uply* (2)]. Therefore, I am of opinion that by this codicil, or the part of the will comprised in the endorsement, there is no gift to the children of the testator, otherwise than as they might take by execution of the power by Lady Sunderland, and, consequently, the legacy is a mere gift to her for life with power to dispose.

This leads to the other part of the consideration of the first question, viz., the act done by her in execution of the power, and the consequence thereof. She had several ways to execute it, by deed or instrument in writing or by a proper will. I am of opinion that, whichever way she took, to make any of the children of the testator take by virtue of it, it must be a complete act done by her, and that an imperfect act in execution of this power would not make any part of this money vest in any of the persons to take under it, for it is admitted by the defendants' counsel that there is no purchaser, no greater merit in one than the other, all being volunteers, and, therefore, no ground to supply any defect in the execution of the power. She has chosen to execute it by will, and, two of the appointees dying in her life, the question is what under these circumstances is the effect of the execution of the power as to them. Can their representatives take the sums appointed?

To determine this, one thing is necessary to be settled, viz., the nature of the instrument by which the power is executed. The plaintiff insists that it is by a will. The defendants say that it is not by a proper will for that she was a feme covert at the time, but by an instrument in writing which may have a different effect from a will. I am of opinion that this act of hers in execution of her power must be considered as a will and may be truly so as a proper will in this cause, but, if not, still it may as a writing in nature of a will, and then it will come just to the same thing as to the present question. A feme covert may make a proper will, proved in the ecclesiastical court, with the assent of her husband according to the express resolution of *Mariot* v. *Kinsman* (3), where it came in question upon a bond in pleading. Whether there has been such an assent in this case depends on the deed of settlement made on her second marriage. I am of opinion that it does amount to a sufficient assent to her making a will concerning this £30,000. It is said barely to relate to the interest. If it had done so, when there is an express recital of the will and codicil, and the principal and interest arise under that will, and she was only to take the interest, I should have thought it was an assent to a complete will, but it goes further, for the word "improvement" does not take in interest only, but improvement of the capital which is part of the principal and would go to be divided as the principal, for it is established that the increase and rise in value of the principal shall go to the principal and not go to the tenant for life in being. Supposing this not a proper will, still it must be considered as an instrument in the nature of a will which shall have the same consequence as if a will according to the construction of the court.

Taking it either way, as a proper will or an instrument in the nature of a will, I am of opinion, that neither the representatives of John Spencer nor Lady Morpeth could take anything by this execution of the power, unless it vested in their testator or intestate, only derivatively, and through them. It is certain that an executor or administrator cannot take by virtue of that representation anything but what first vested in the testator or intestate, which brings it to the question whether by this execution of the power anything vested in them in their lives. It is plain that by virtue of a will or an instrument in the nature of a will, no legacy or gift can vest until the death of testator, and admitted that, if this was a gift of Lady Sunderland and a legacy from her so that the children were to take by or under her, it would be so, for it is admitted that the will is not complete until the death of the testator. But it is insisted that, this being in execution

of a power, nothing is taken under the instrument by which the power is executed, or under the person executing, but under the giver of the power, and as legatees in the will of the testator. This is true to certain purposes, but holds not to the extent contended for on the part of the defendants, that is, not to show that these two legacies or sums of money vested by virtue of the execution of this power in the children in their lives, for to that only can it be material. There is no case where that has been said to be under a will whether that will operates by way of giving a legacy or interest derived from the testator in that will, or by way of the execution of a power, or instrument in nature of a will, which is the same for still it is a testamentary act and the law says that a testamentary act is only inchoate during the life of the testator from whose death only it receives perfection, being until then ambulatory and mutable, vesting nothing, like a piece of waste paper according to the doctrine in *Brett* v. *Rigden* (4), where MANWOOD does not argue that the will could have effect during the life of the testator, but only that the heir should take by purchase as devisee in the will that the will might take some effect.

The cases put for the plaintiff are very material, viz., of a will of land in execution of a power, and the word "will" generally used (which before the Statute of Frauds would be sufficient if it was a will not executed by any witnesses) it is determined that a will to pass lands by virtue of a power must have the requisites in that statute. It is the same as to a power to appoint personal estate by will; unless there are other words which are contended for to give a larger manner of executing the power, it must be such a will as will pass personal estate. So is the case of copyhold lands very material, not that there is any authority, but as it is a thing which must have often happened. Copyhold lands are surrendered to the use of a will; the surrenderer makes a will, and appoints the uses thereof: the law says the lands pass by the surrender, and the will is only directory of the uses. Though the lands are so appointed, if the appointee died in life of testator, it was never thought he could take benefit of it, which must have often happened, considering the number of such wills, and yet it was never contended that it would vest in an appointee dying in the life of the testator because the act was not complete, it being no will until his death, and, consequently, at the time it should vest there is no person to take.

So, if a power is given by deed to appoint lands by will, and the person to whom the power is given makes a will and gives the lands to A. and his issue, the law says that, although such appointee takes under the power, yet the execution of the power being by will, it shall receive the same construction as if a devise of lands, viz., an estate tail. So if it had been to A. for ever, that would have been an estate in fee. It was never doubted, but that the construction of the words would be the same exactly as if he took strictly and properly under the words of a will, and, indeed, it is repugnant to the nature of the instrument that any person should take, or have anything vest, by will in the life of the testator, and every person claiming under the execution of a power must claim, not only according to the power, but the nature of the instrument by which that power is executed. Therefore, a will in execution of a power (suppose it was of lands) would be alterable or revocable according to the Statute of Frauds by cancellation or any of those methods as a proper will would be, because it is the nature of the instrument which causes that. Suppose that such a power was to be executed by deed only, it might be as well said that the party to take under the execution of that power should take by an incomplete deed as in this case by a writing not complete until the death of the testator, there being as great an imperfection in one case as the other. If this was to be taken as an instrument in writing generally, and to have the same effect as if Lady Sunderland had made such a common instrument without calling it a will, appointing this payment after her death, as has been argued, that would change the nature of the instrument, and the intent of Lady Sunderland. The consequence would be that it would be irrevocable, for it is revocable only by the nature of the instrument itself, but turn it into another instrument, neither a

will nor an instrument in writing in nature of a will, it is not revocable, for it is determined that, notwithstanding under such a power she might have executed it toties quoties, have reserved a new power to herself, and might revoke, yet if she does not reserve a new power it is irrevocable, which was the resolution of all the judges in *Hele* v. *Bond* (5) in the House of Lords.

There Hele had a power in a deed to revoke and appoint new uses as often as he pleased. He executed a deed and revoked, and so a second and third time, and the question was whether this last revocation was good. It was held not good for want of an express revocation, that this power amounted to no more than a common power of revocation expressed in a great number of words, and, therefore, the party could not revoke toties quoties by virtue of this original power of revocation, but it enabled him to insert a new power of revocation if he pleased, which not having done, he had executed his power. So if I should hold this paper to be neither a will nor an instrument in nature of a will, it would be an instrument irrevocable by Lady Sunderland, which would, undoubtedly, be contrary to her intent. It is only revocable from being a will or in nature of a will, and, if so, it is equally incomplete until her death. Consequently nothing could vest in either of the legatees until her death, at which time, it is a principle of law, there must be a donee or appointee to take, whereas here they were not then in rerum natura, and, consequently, no legatee, donee, or appointee (call it which you will) to take at the time the thing was to vest.

From this construction of this paper *Kibbet* v. *Lee* (6) is material, viz., that this, whether as a will or instrument in writing in nature of a will, is a declaration in law of Lady Sunderland that it should take effect only from her death. To this it was said that in the present case it is otherwise because the appointee must take under the power and as if named in the power, and that it was a gift of the testator in his will, she being only an instrument, and that the whole reverts back to the power under which merely they take, which relation will overreach the death of these two parties, both being living at the death of testator, and then it may be considered as vesting in them in their lives, which I deny. I admit the principle that where a person takes by execution of a power, whether of reality or personalty, it is taken under the authority of that power, but not from the time of the creation of that power. There is no case that the relation shall go back for that, which is quite of another nature, and that is the point, which must be contended for here, that they must take by relation so as to make them take from the time of the creation of the power, for which there is no authority and that would be unreasonable. The meaning that the persons must take under the power, or as if their names had been inserted in the power, is that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument. Then they shall take as if all that was in the instrument executing had been expressed in that giving the power.

So is it in appointments of uses. If a feoffment is executed to such uses as he shall appoint by will, when the will is made it is clear that the appointee, cestui que use, is in by the feoffment, but has nothing from the time of the execution of the feoffment so as to vest the estate in him. The estate will vest in him according to the nature of the act done and appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the power, but according to the time of that act executing that power, not like the referring back in case of assignment in commission of bankruptcy, that is by force of the statute and to avoid mesne wrongful acts. The case was put of a bargain and sale which was said to be like this of a will or an instrument in the nature of a will. A bargain and sale, when acknowledged and enrolled, has relation to the time of execution, and if the grantee dies within six months and afterwards it is acknowledged and enrolled, it is good. That is because it is a collateral act required by Act of Parliament, and not arising from the nature of the instrument itself. Consider the consequence if this were otherwise, that by such a will or an instrument in the nature of a will, executing such

A a power anything should be held vested in the testator's life, and that the reference to the power should be a reference not only to the substance of the power, but also to the time of creation. It might be as well said that Lady Sunderland might have appointed this money to them if they had died before her making the will, for it is just the same thing, and the case of the bargain and sale, if applicable, would hold equally. Then the consequence would be that she might execute this B power by giving all, or the greater part, to herself; for she was representative of her son William who died before her will, and it would be absurd that powers of this kind should be executed for the benefit of a person dead at the time of executing.

It is contended that there is a great difference between powers, and that this shall have effect in this manner because it is a naked power, those sums being never part of her property, she being only an instrument, so that, whatever execu- C tion, it would have this effect though contrary to the nature of that paper itself, that the quality and nature of the will should be out of the case and considered barely as an instrument in writing, though it is allowed that where a power is coupled with an interest the party should be considered as disposing of the interest, and it should have another effect. This is the first time I have heard that the execution of a naked power should be construed more favourably than that of D powers coupled with an interest. The rule of law is otherwise because the party there in some measure parts with his own property as a kind of dominion he has over the estate, those powers being construed liberally, but naked powers always strictly.

It is further asked: Where is the difference? That, it being admitted that she might have done this by deed or instrument in writing, not calling it a will, and E might have annexed a power of revocation so as to enable her to revoke that, and to execute the power over again, this amounts to the fame, but that is not ad idem. If she had executed this power by deed or instrument in writing, though with a new power to herself, the consequence would be that the instrument was complete in itself. The thing would have vested from the time of the execution of that instrument, and the power of revocation would have no effect but to leave F it mutable during her life. But there is a vast difference between a deed or instrument with power of revocation and a will. The first is a complete act; a will not so, death being necessary to the completion as well as to make the thing pass. Really, if in questions of this kind such execution of powers by will were to have this construction, and to make anything vest in the testator's life so that a person dead at the consummation of the will might take thereby, in nineteen G cases out of twenty it would be contrary to the authority of the power and intent of the person executing. This I mean in general, not as to the present case, for consider what a person does when making a will. Lady Sunderland must know that she ran no hazard because the instrument was revocable until her death, but if a court of justice should, contrary to the nature of the instrument, hold that, though the party dies in the life of the person executing the power, it will vest in H the executor or administrator, that may be in a mere stranger both to the author of the power and the person executing. That would be the consequence, like the cases of wills obtained from young persons by surprise, as from a young lady at a boarding-school (an instance of which I remember in this court) the master getting her, she being above seventeen, to make a will and him executor. So, if this would be good notwithstanding the dying in life of testator, it would make it go to a I stranger.

But it is said that it has been determined that such an execution of a power by will may be good to make it transmissible to the representatives of the person dying in the life of the testator, for which is cited *Burnet* v. *Helgrave* (7), and if it had not been for that, I should not have spent so much time about this. If that case is considered, it is no authority against the opinion now given, or that I gave, in *Oke* v. *Heath* (8), for there the person executing the power was not limited in respect of the objects. It was a general power to such as she should appoint. She appointed to her second husband who died in her lifetime and made her

executrix, so that it really came back to herself, and her representative claimed it under the execution of the power. That was a case to tempt a court of justice to go as far as possible to make it good, because it came back to the person and the same thing as if given to her own benefit, and the court only supported that in her which was really originally given for her benefit. It was no doubt in her power to appoint her executors originally, if she pleased, because she might do it to any person whatever, and there the court might consider that word "executors" so as not to take by representation, but as a description of the person to take, and there is something in the case which favours that. It is imperfectly reported in Eq. Cas. Ab., 296. Executors may certainly be made use of either in a deed or will as distinct and separate persons from the testator, which is the case of a special occupant: 2 Roll. Abr. 151, where the executor shall be special occupant, which shows that executors may take by that name as distinct persons and not in representation of the testator. The court cannot be sure on what Lord Harcourt went in that case, yet there was room for that from the words, and always were to be taken there to support it, as it was to be considered as if originally given for her benefit. Whether that be so or not, it is a single authority, and it was a cause heard by consent which certainly weakens its authority as it proves it in general not to be so fully considered, and commonly there is a disposition in the parties to give way to what the court thinks equitable, nor is there that opposition as in other cases. Therefore, on the whole, on this first point, I am of opinion that nothing vested by this instrument in John Spencer or Lady Morpeth during their lives, and consequently nothing is transmissible to their representatives. To make it do so would be contrary to the principle of law that the person must be in being at the time the thing is to vest.

Which brings it to the next question, whether these sums will fall into the residue of the testator's personal estate or accrue to his children? Whether it shall accrue to all his children and their representatives depends on the question at first considered, the construction of the clause in the codicil, viz., whether anything is given to the children of the testator eo nomine otherwise than by description of such as she should appoint to, and, consequently, nothing to vest in them abstracted from her appointment. It would be very difficult to determine in what they should take, or how it should vest, if that was to be the case. The proportions as well as the gift were to be settled by Lady Sunderland, who has given in her lifetime several parts to several of them. What shares were to vest? Were they to take as joint tenants? That is denied by the representatives of the deceased children because that would exclude them and make it to the survivors. If to take as tenants in common, what are the shares? The settlement of the proportions and shares was to be by Lady Sunderland. None can take as tenants in common of uncertain, though they may of unequal shares, and, if there was anything in this so as to make them take as children of the testator, I should incline that they should take as joint tenants, and, consequently, it should survive. No words of division or distribution are made use of by the testator but by way of reference to the division and distribution to be made by Lady Sunderland, so that it is part of her power only and not distinct from her power, that imports a division between them as tenants in common. How could it be? If all were to take this remaining £17,000 equally in proportion among them as tenants in common, there would be an unequal proportion thereby among them for Lord Robert's share, having £6,000 given him, would be made more, which would be contrary to the construction attempted on this. I found myself on this, that this is no gift to the children, and, consequently, the children cannot take as such.

The next question is whether the residuary legatee can take it, for then the plaintiff, representative of his brother, stands in his place and will be entitled. The objection to this is that the exception takes out of the residuary bequest this whole £30,000 being endorsed in his hand. Therefore, it is contended that it must be considered, if not well appointed, as something undisposed of by the will of

testator, and, consequently, must be distributed. But it has not been mentioned how it should be distributed, for, if so, the mother must come in for one-third part of that distribution whereas the counsel for her executrix have not insisted thereon, nor can it be contended that the intent was to leave it in her power to make no appointment, and so be entitled to one-third, which would be the consequence if this was the construction. Not that, I suppose, the testator had any distrust in her, and she has acted very honourably, giving away part in her life, but the putting this case shows that no presumption can be of that kind. But if the will is so, it must have its effect. Here is a clear intent in this will to make a disposition of the testator's whole personal estate, and it is pretty strange, if that should be the construction that where one has made a residuary legatee of all the rest he should die intestate as to part.

There may be possibly such a case, and for this was cited *Davers* v. *Dewes* (9). But this differs widely from that which was a reservation of particular specific things, as goods, etc. Consequently, the things themselves were absolutely taken out of the residuary bequest, and the court thought there was no ground to insert them in it. That is not the case here. The testator has given this legacy by his will. Supposing Lady Sunderland had died in the lifetime of the testator, that £30,000 would have gone into the residue as lapsed notwithstanding this exception. No legacy at all is given by the codicil. He has restrained his wife's legacy, which was absolute, to a gift for life only, but no legacy. Suppose it was to be considered as a legacy, what does it import? Not the thing, but the interest given in the thing. That interest he has given to his wife for life, and afterwards to such as she should appoint, according to such estate and interest as she should appoint. Suppose it was a residuary devise of real estate, and except thereout such devise as shall by codicil, etc., and he should by codicil make a devise for life, the interest is only taken out of the residuary devise. There the word "legacy" answers to the word "devise". Besides this is saying no more than the law implies: it is doing nothing by this exception. If a man gives all his personal estate, it leaves it open to the codicil, which, if made, shall supersede. This exception, therefore, nil operatur. It is like *Hele* v. *Bond* (5). There was a power which might be revoked toties quoties, and, therefore, it was said that there might be a second revocation thereby, but the court held otherwise that it was only saying by a circumlocution of words what the law would construe the effect. So here it is only taking out of his residuary devise such an interest as he should give by his codicil which the law would have done for him. Suppose by the codicil he had given the £30,000 to Lady Sunderland, for life, without saying anything of the power. The residuary interest therein would undoubtedly have gone to Lord Robert after her death, and especially when it comes in by the way of lapse. An executor or residuary legatee stands in the same light as an heir so as to take something falling in without the intent of the testator as by operation of law. But the negative words are insisted on, that this £30,000 is given for no other use or purpose whatever. I cannot construe these words in that manner, but that they are limitations or restrictions on the power of Lady Sunderland, and, if taken in the large sense, it would make it caduceary [subject to lapse or escheat] which none can do with his property so as to make it go to none whatever. No one can say that his lands shall not go to his heirs who shall have them notwithstanding. So of personal estate, one cannot say that his executor or his next-of-kin shall not have it, for he shall, notwithstanding, by the law. So that this is by a reasonable construction to restrain Lady Sunderland that she should not have power to appoint but to his own children.

Consequently, these lapsed legacies will fall under the residuary bequest to the plaintiff as representative of his brother, and there must be a decree for payment, and account of interest from the death of Lady Sunderland. His Lordship added that one answer to all the cases cited for the defendants was that they were all cases where the bequest amounted to a legacy to all the children, as where it was

"to be divided among all my children" it amounted thereto, being still legatory words, whether it was by the word "give" or "desire," and the person would be obliged by the court to give something to every one of the children. Consequently, only the proportions were entrusted to the appointor; the objects were fixed.

MANBY AND ANOTHER *v.* SCOTT

[Court of King's Bench (Foster, C.J., Malet, Twisden and Wyndham, JJ.), Michaelmas Term, 1660]

[Court of Exchequer Chamber (Foster, C.J., Wadham, Wyndham, Twisden and Malet, JJ., Bridgman, C.J., Hyde, Browne and Tyrrell, JJ., Hale, C.B., Atkyns and Turnor, BB.), Trinity Term, 1663]

[Reported 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E.R. 1065]

Husband and Wife—Husband's credit—Right of wife to pledge—Wife living apart without husband's consent.

A wife who chooses to live apart from her husband without his consent has no implied authority to pledge his credit, and the husband is not obliged to pay for goods that she has purchased on credit.

Note. Considered: *Tod* v. *Stokes* (1698), 12 Mod. Rep. 244; *Compton* v. *Collinson* (1790), 1 Hy. Bl. 334; *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550; *Johnston* v. *Sumner* (1858), 3 H. & N. 261; *Jolly* v. *Rees* (1864), 15 C.B.N.S. 628; *Bazeley* v. *Forder* (1868), L.R. 3 Q.B. 559; *Miss Gray, Ltd.* v. *Cathcart* (1922), 38 T.L.R. 562. Referred to: *Dyer* v. *East* (1669), 2 Keb. 554; *Bolton* v. *Prentice* (1774), 2 Stra. 1214; *Hatchett* v. *Baddeley* (1776), 2 Wm. Bl. 1079; *Nurse* v. *Craig* (1806), 2 Bos. & P.N.R. 148; *Montague* v. *Baron* (1825), 5 Dow. & Ry.K.B. 532; *Woodward* v. *Dowse* (1861), 8 Jur.N.S. 413; *Beale* v. *Arabin* (1877), 36 L.T. 249; *Debenham* v. *Mellon* (1880), 29 W.R. 141; *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (1902), 87 L.T. 635 (see [1900–3] All E.R.Rep. 397, H.L.); *Selby* v. *Atkins* (1926), 135 L.T. 45; *Dewe* v. *Dewe*, [1928] All E.R.Rep. 492; *Price* v. *Price* [1951] 2 All E.R. 580; *Bendall* v. *McWhirter*, [1952] 1 All E.R. 1307; *Biberfeld* v. *Berens*, [1952] 2 All E.R. 237; *Short* v. *Short*, [1960] 3 All E.R. 6.

As to contracts of wife during coverture, see 19 Halsbury's Laws (3rd Edn.) 852 et seq.; and for cases see 27 Digest (Repl.) 173 et seq., 192 et seq.

Cases referred to:

(1) *Sir Nicholas Poines' Case* (1564), 2 Dyer, 234 b.

(2) *Bishop of Salisbury's Case* (1613), 10 Co. Rep. 58 b; cited in Hob. 44; 77 E.R. 1013; 19 Digest (Repl.) 254, *178.*

(3) *Dr. Hussey's Case* (1611), 9 Co. Rep. 71 b.

(4) *Green's Case* (1625), Cro. Car. 16.

(5) *Forse and Hembling's Case* (1588), 4 Co. Rep. 60 b; 76 E.R. 1022; sub nom. Anon., 1 And. 181; Gouldsb. 109; 48 Digest (Repl.) 14, *15.*

(6) *Tracey* v. *Dutton* (1621), Cro. Jac. 617; Palm. 206; 79 E.R. 531; 31 Digest (Repl.) 250, *3847.*

Action of assumpsit brought by the plaintiffs, traders, claiming the price of goods sold by them to the defendant's wife.

A special verdict before Malet, J., found that the wife of the defendant, Scott, left him without his consent, and lived for twelve years separate from him, and then

returned. The defendant would not then receive her or allow her any maintenance, and discharged (or forbad) tradesmen, particularly the plaintiffs, from trusting her with any wares. The plaintiffs being mercers had sold the wife wares to the amount of £40 and the prices were reasonable, and the things fit for her quality. If the husband was obliged to pay for them the jury found for the plaintiff; if not, for the defendant.

This case was argued at the Bar three times. First, by *Alleyn* for the plaintiff, and *Wylde* for the defendant; secondly, by *Finch* for the plaintiff, and *Serjeant Beare* for the defendant; and thirdly, by *Jones* for the plaintiff and *Serjeant Baldwin* for the defendant. All the judges at the bench, namely FOSTER, C.J., MALET, TWISDEN and WYNDHAM, JJ., agreed that the verdict was sufficient although it did not find what the goods were, for although what is fit and necessary is to be tried by the court, yet it is that court before which the cause is tried, and not the court before which it comes to be adjudged on the special verdict. That these goods were fit for her quality is agreed by both the jury and the court where the cause was tried.

Whether the husband should be charged, the court was divided in opinion.

TWISDEN and **MALET, JJ.**—The husband should be charged, for when the wife returned to her husband and he would not receive her or provide a maintenance for her, if nobody would trust her so as to charge the husband she must starve. For she could not earn her living by her labour for whatever she gained by her labour the husband should have. Therefore, of necessity she must be trusted, and the things being necessary for her living, the husband ought to be charged for them. The husband's prohibiting the plaintiffs to trust her, could not deprive her of the liberty which the law gives to her for preservation of her life. For the law for necessity dispenses with things which otherwise are not lawful to be done, [e.g.] as to throw down my neighbour's house for preventing the spreading of fire, to throw goods out of a boat when it is overladen, and the like.

We agree the case put by FINEUX, C.J., in Y.B. 21 Hen. 7, fo. 40, pl. 64, that the wife cannot provide bread for the family so as to charge the husband. But here the provision is necessary for the maintenance of her own life, and although alimony be recoverable in the spiritual court, yet if the husband be obstinate and will not obey their sentence, how shall the woman live? And if he will obey it, yet how shall she live in the meantime? As to the cases cited, of writs to the sheriff for delivering to the wife reasonable estovers, those were in the time of Henry VIII and have been long disused.

[TWISDEN, J., held that in this case the plaintiffs might have trover against the husband for the goods, if the contract were void. All the other judges disagreed. The goods being delivered by the plaintiffs and they could not to re-have them. TWISDEN and MALET, JJ., held that as the husband should be bound in trespass or in trover for goods taken by the wife, for a trespass done by the wife, so he should be here for goods sold to her for relief of her necessity.

To maintain the opinion for the plaintiffs, Y.B. 20 Hen. 6, 26; DYER, 234 [*Sir Nicholas Poines' Case* (1)]; 11 Hen. 6, 30, were cited. Also *Bishop of Salisbury's Case* (2). That a bishop may grant an office of necessity notwithstanding the statute of 1 Eliz., c. 19 [alienation by bishops: repealed]. And 9 Co. Rep. 73 [*Dr. Hussey's Case* (3)], a feme covert excused in a ravishment of ward for necessity, because she has nothing to pay. It was no advantage to the husband, for he is charged only for necessaries, and those he must have provided if the wife had continued with him, and divers other matters were said, and divers other authorities cited on this side.]

FOSTER, C.J., and **WYNDHAM, J.**, were of the contrary opinion: On this part it was argued that the husband should not be charged; for when the wife departs from her husband against his will and remained for so long absent, and returned again at her own pleasure, the husband should not be obliged to maintain her after her return, any more than when she was absent. For if it were so, wives might leave

their husbands in their youth and return in their old age, when they could not be so assisting to their husbands as before.

Their society, assistance and comfort to their husbands was one consideration of their maintenance. A feme covert could not make any contract to charge her husband without his assent, precedent or subsequent, expressed or implied. They, their Lordships, did not deny but that as circumstances might be, an express or implied assent of the husband might appear to a jury, so that the contract of the wife might be the contract of the husband; as [for example] if the goods came to his house, or he appeared well content with the use of them. But here the contrary appeared, for the plaintiffs were forbidden by him to sell to or trust his wife, and it did not appear that he ever had knowledge of this sale and so could have not approved thereof. [Further,] the jury having found only the forbidding and the sale, the court was obliged to adjudge according to the law, that the contract was void, for a feme covert has not power of herself to make any contract.

It was not like to the case of infants, for their contracts are to some intents good, and might be made good by them at their age; but the contracts of feme coverts were absolutely void, for they had not any power or wills, but were subject to the will of their husbands. Every man might trade with what tradesman he would, exclusive of all others; but by this means they should be forced against their will to trade with such as their wives pleased.

The laws of England have provided for wives more reasonably than to make them their own carvers, namely, to go to the ordinary for alimony, the costs of which suit the husband should pay, if the wife had just cause of complaint: *Green's Case* (4); and to supply it in case of the husband's obstinacy; 8 Hen. 3 Rot. Claus. Memb. 19, vel. 39, *Fretchingfield's Case*, and 4 Hen. 3 Rot. Claus. Memb. 3, where the husband was obstinate, writs De Estoveriis habendis were directed to the sheriff to levy estovers (i.e., maintenance) for the wife, of the husband's goods.

Although those cases were ancient, they were still law, although the law had now provided another remedy against the obstinacy of the husband, by Excommunicato capiendo.

In maintenance of the opinions on this side, were cited Y.B. 21 Hen. 7, fo. 40, pl. 64, that the wife cannot charge her husband for victuals bought for the family without his command precedent or agent subsequent. FITZHERBERT'S NATURA BREVIUM 120, G., the contract of the wife shall not charge her husband any more than the contract of the servant. *Forse and Hembling's Case* (5), she can neither make a will [see now Law Reform (Married Women and Tortfeasors) Act, 1935], nor revoke a will made before marriage, because she has no will and, therefore, the marriage is a revocation [see now s. 18 of Wills Act, 1837], for else the will would be irrevocable. *Tracey* v. *Dutton* (6), her receipt after marriage of the rent of her own land, shall be no discharge against the husband, although the tenant had no notice of the marriage, 31 Edw. 1, tit. Debt. 663 and 3; 20 Hen. 6, 22; 27 Hen. 8, 24, 25; 13 Rich. 2, tit. Annuity 50.

FOSTER and **WYNDHAM, JJ.,** held the prohibition by the husband to be material.

THE COURT being thus divided, the cause for the great weight thereof was adjourned into the Exchequer and there, after divers arguments at the bar, it was solemnly argued by all the judges severally at several days at the bench. TYRRELL, joined in opinion with TWISDEN and MALET, JJ.; all the rest, namely, BRIDGMAN, C.J., of the Common Pleas, HALE, C.B., of the Exchequer, HYDE and BROWN, JJ., of the Common Pleas, and ATKYNS and TURNOR, BB., and FOSTER, C.J., and WADHAM and WYNDHAM, JJ., of the King's Bench agreed that the husband should not be charged, but that judgment ought to be given for the defendant. And so it afterwards was on a motion in the King's Bench.

Judgment for defendant.

FULWOOD'S CASE

[Court of Queen's Bench (Sir Christopher Wray, C.J., and other judges), Hilary Term, 1591]

[Reported 4 Co. Rep. 64 b; 76 E.R. 1031]

Corporation—Corporation sole—Devolution—Personal property vested in lay corporation sole—Devolution to successors.

C., the owner of a number of freehold houses, entered into a recognisance for orphanage money with the chamberlain of the city of London and his successors. He later entered into a recognisance with an individual, R. At a later date R. sued execution on his recognisance, and the houses were delivered to him by the sheriff, no return being made to the writ of execution. Then the chamberlain's successor sued execution in London by a process in the nature of an elegit directed to the Serjeant at Mace, who delivered half the houses to the chamberlain. In subsequent proceedings between an assignee of both creditors and a lessee claiming under C.'s heir, it was contended that the first recognisance did not devolve upon the successor of the chamberlain but on his personal representatives.

Held: the chamberlain of London, though a corporation sole, was enabled by custom to take recognisances, obligations, etc., for orphanage money to him and his successors, and such recognisances, etc., went to his successors and not to his executors.

Notes. Referred to: *Lyn* v. *Wyn* (1665), O. Bridg. 122; *Plummer* v. *Whitchot* (1676), 2 Mod. Rep. 119; *Rennell* v. *Lincoln* (1827), 7 B. & C. 113; *Mirehouse* v. *Rennell* (1832), 8 Bing. 490; *Graves* v. *Colby* (1838), 9 Ad. & El. 356; *Power* v. *Banks*, [1901] 2 Ch. 187.

As to corporations sole, see 9 Halsbury's Laws (3rd Edn.) 7 et seq.; and for cases see 13 Digest (Repl.) 187, 188, 289 et seq.

Cases referred to:

(1) *Byrd* v. *Wilford* (1596), Cro. Eliz. 464; 78 E.R. 717, Ex. Ch.; 13 Digest (Repl.) 188, *57*.

(2) *Hutchins* v. *Player* (1663), O.Bridg. 272; 124 E.R. 585.

(3) *Arundel's Case* (1615), Hob. 64; 80 E.R. 212; 13 Digest (Repl.) 188, *70*.

(4) *Cort* v. *Bishop of St. David's* (1634), Cro. Car. 341; 78 E.R. 899; 19 Digest (Repl.) 252, *148*.

(5) *Corven's Case* (1612), 12 Co. Rep. 105; 77 E.R. 1380; sub nom. *Garven and Pym's Case*, Godb. 199; sub nom. *Pym* v. *Gorwyn*, Moore, K.B. 878; 19 Digest (Repl.) 496, *3279*.

Action of ejectment by one Cartwright against Roberts to try the title to certain houses in London.

The following facts were found by a special verdict. Thomas Castle was seised of the houses aforesaid, and in 1559 married and later the same year, in the court of the Mayor and Aldermen of London, acknowledged a recognisance of £250 to the chamberlain of the city of London and his successors, according to the custom for orphanage money. In 1566 in the court the Recorder of London and Mayor of the Staple, he acknowledged a debt of £200 to Sir Thomas Rivet. In 1568 Sir Thomas Rivet sued execution upon the said statute and had a liberate, upon which the sheriff delivered to him the said houses, among others, but it did not appear that the liberate was returned; and afterwards the successors of the chamberlain sued execution in London by a precept in the nature of an elegit directed to the Serjeant of the Mace, who by force thereof delivered the said houses (among others) to the chamberlain as representing one moiety of the conusor's land. Afterwards Thomas Castle died, and after his death his widow recovered dower, and had the houses assigned her for her third part to hold in dower. She died in 1576 and afterwards

the chamberlain assigned over his interest to one Fulwood, and in 1579 Sir Thomas Rivet assigned over his interest to the said Fulwood also. In 1587 the heir of Thomas Castle demised the said houses for a term of years to Guilbert Sharington, who demised to the lessor of the plaintiff, upon whom the defendant by title derived from the said Fulwood entered. The question was whether the defendant's entry was lawful or not.

William Daniel, *James Dixon* and others for the plaintiff.
Edward Coke and others for the defendant.

SIR EDWARD COKE, in his report, stated that in this case eight points were unanimously resolved by Sir Christopher Wray, C.J., and the whole court. First* it had been objected that in the case of a corporation sole or body politic, be it created by charter or prescription, e.g., a bishop, parson, vicar, master of a hospital, etc., no chattel, whether it is a chose in action or possession, shall devolve upon the successors, as opposed to the executors or administrators of the bishop, parson, etc., any more than the heir of a private man; for succession in a body politic is inheritance in the case of a body private. It is otherwise in case of a corporation aggregate of many, e.g., a dean and chapter, mayor and commonalty and the like, for they, in judgment of law, never die: see per curiam, Year Books 8 Edw. 4, 18; 20 Edw. 4, 2 a. It was therefore argued, the chamberlain of London being a corporation sole, that his successor could not have the recognisance which had been acknowledged to his predecessor; nevertheless the court resolved that the successor should have it, for in this case the corporation of the chamberlain was by custom; and the same custom which created and made him a corporation in succession for this special purpose concerning orphanage enabled his successor to take such recognisances, obligations, etc., as had been made to his predecessor. Such custom is grounded upon great reason; for the executors or administrators of the chamberlain ought not to intermeddle with such recognisances, obligations, etc., as by the said custom are taken in the corporate capacity of the chamberlain, and not in his private capacity; but a bishop, parson, etc., or any corporation sole which are bodies politic by prescription, cannot take a recognisance or obligation in their politic, but only in their private capacity, for there is no such custom as in the present case to take a chattel in their politic or corporate capacity.†

Judgment for defendant.

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* The case is reprinted only on the first point. The remaining points related to modes of execution now obsolete.

† For the proposition that by custom the chamberlain of London may take bonds and recognisances in succession for orphanage money, see *Byrd* v. *Wilford* (1), Cro. Eliz. 464, 682; *Hutchins* v. *Player* (2), O. Bridg. 302; but it will not follow from thence that he has a capacity to take a lease for years to himself and his successors for the same purpose, for the custom extends not to that; nor that he may take a bond to himself and his successors for any other purpose than the benefit of the orphans' fund; for that also is not warranted by the custom: 2 Bl. Com. 432.

As a corporation sole cannot take a term in its corporate capacity, but must take the term in its natural capacity: *Arundel's Case* (3), Hob. 64, 1 Roll. Ab. 515, the term will merge in a reversion or remainder in fee afterwards granted to such sole corporation as an individual, for he then takes both estates in his own right; 3 Prest. Conv. 284.

The ancient jewels of the Crown shall go to the successor, and are not devisable by testament: Co. Litt. 18 b. This Mr. Hargrave observes, note 1. Co. Litt. 9 a is not to be considered as an instance of a corporation sole taking chattels in succession, but rather as one of a personal chattel descending like a thing of inheritance. The King may dispose of such jewels by letters patent: per Berkley and Jones, JJ., in *Cort* v. *Bishop of St. David's* (4), Cro. Car. 344. Also the ornaments of the chapel of the predecessor belong to the succeeding bishop, and are in succession: *Corven's Case* (5), 12 Co. Rep. 107.

LANOY *v.* DUKE AND DUCHESS OF ATHOL

[Lord Chancellor's Court (Lord Hardwicke, L.C.), November 13, 1742]

[Reported 2 Atk. 444; 9 Mod. Rep. 398; 26 E.R. 668]

Equity—Marshalling—Post-nuptial settlement—Covenant by settlor to pay widow's jointure—Insufficiency of settled estate for payment of jointure and daughter's portion.

By an ante-nuptial marriage settlement in 1718 the husband settled freehold, leasehold and copyhold estates on himself for life followed by a jointure rentcharge for his life of £500 per annum in lieu of dower and subject thereto to his heirs male with remainder to himself in fee simple. He further covenanted for payment of the wife's jointure by his heir, executors or administrators. After the marriage he assigned some copyholds to the use of his will, and by a will made in 1719 bequeathed the residue of all his estate to his wife, directing that, if he left only a daughter and no male issue, his wife should pay the daughter £6,000 on marriage. In 1723 he became entitled to a large sum of money in right of his wife and re-settled the property comprised in the earlier settlement on himself for life followed by the same jointure rentcharge as before with remainder to trustees for a term to raise £6,000 for daughters' portions, if no issue male, and to provide maintenance during infancy at the rate of £80 per annum. He died leaving one child, a daughter, who was the plaintiff. His widow re-married, becoming Duchess of Athol, the defendant. In proceedings between the parties it was held that the re-settlement of 1723 revoked the will as to the settled freehold and leaseholds and as to the £6,000 legacy, but the freeholds and copyholds not comprised in the settlement passed to the plaintiff under the will, and the defendant was ordered to account for the rents and profits of the settled land since the death of the settlor, deducting in priority £500 per annum for her jointure, £293 for costs, and £80 per annum for the plaintiff's maintenance. On this footing, the income of the estate being deficient, the Master reported a balance due to the defendant of £3,937: if, then, the defendant lived some years more and the deficit was a charge on the settled land the plaintiff would lose her portion and her inheritance. On a re-hearing before the Lord Chancellor it was objected that the decree in the former suit made no provision for payment of arrears of the widow's jointure or of the daughter's maintenance and the plaintiff claimed to have the arrears of maintenance discharged out of the testator's personal and copyhold estates.

Held: (i) in respect of her portion, the plaintiff was considered as a creditor in equity, and, therefore, entitled to require the defendant to satisfy her own debt out of any fund available to her on which the plaintiff had no charge, namely, the testator's personal and copyhold estates; (ii) as to her maintenance, the plaintiff could assert the same right, but she could not claim to satisfy her own arrears out of the defendant's fund.

Notes. Followed: *Lechmere* v. *Charlton* (1808), 15 Ves. 193. Applied: *Graves* v. *Hicks* (1833), 6 Sim. 391; *Barnes* v. *Racster* (1842), 1 Y. & C.Ch. Cas. 401; *Loosemore* v. *Knapman* (1853), Kay, 123; *Gibson* v. *Seagrim* (1855), 20 Beav. 614. Considered: *Flint* v. *Howard*, [1893] 2 Ch. 54. Referred to: *Sykes* v. *Meynal* (1743), 1 Dick. 369; *Bugden* v. *Bignold* (1843), 2 Y. & C.Ch. Cas. 377; *Hickling* v. *Boyer* (1851), 3 Mac. & G. 635.

As to doctrine of marshalling, see 14 Halsbury's Laws (3rd Edn.) 612; and for cases see 20 Digest (Repl.) 526 et seq.

Cases referred to:

(1) *Reeve* v. *Reeve* (1683), 1 Vern. 219; 23 E.R. 426; sub nom. *Reeve's Case*, 2 Vent. 363; 40 Digest (Repl.) 661, *1535*.

(2) *Frederick* v. *Frederick* (1721), 1 P.Wms. 710; 1 Stra. 455; 24 E.R. 582, L.C.; 20 Digest (Repl.) 271, *172*.

(3) *Adams* v. *Cole* (1735), Cas. temp. Talb. 168; 25 E.R. 720, L.C.; 40 Digest (Repl.) 568, *739*.

Petition for a re-hearing.

James Lanoy, upon his marriage with Jane Frederick (now the Duchess of Athol, and mother of the plaintiff) by indentures dated Jan. 28 and 29, 1718, settled his estates in Hammersmith and Fulham to the use of himself for life, and after his decease, to the intent that Jane might have a rent charge of £500 per annum in lieu of dower, remainder his heirs male, remainder to himself in fee. He covenanted that if Jane should survive him, his heirs, executors or administrators would pay her the £500 per annum. After the marriage, Mr. Lanoy surrendered some copyhold estates to the use of his will, and in 1719 bequeathed the residue and remainder of his estate, both real and personal, wholly and solely (after paying his just debts) to the defendant Jane, and appointed her sole executrix, but in case he should leave any male issue by Jane, then he gave to such issue his estate at Hammersmith, freehold, copyhold, and leasehold, paying to his mother £500 per annum; but if he left only a daughter, then his wife should pay her, when she married (if with her mother's consent) £6,000. By indenture dated Oct. 21, 1723, reciting that Mr. Lanoy in right of his wife, was entitled by her father's death to a large sum of money, he, in consideration thereof, covenanted to levy a fine of the estates comprised in the indentures of Jan. 28 and 29, 1718, to the use of himself for life, and after his decease, to secure Jane the rent charge of £500 for life, in bar of dower, remainder to trustees for a term remainder to first and other sons in tail male, remainder to the heirs of the body of Mr. Lanoy, remainder to himself in fee. The trusts of the term were to raise £6,000 for daughters' portions, if no issue male, and maintenance at the rate of £80 per annum. Mr. Lanoy died leaving the plaintiff, his daughter and only child. Jane married the Duke of Athol.

Upon the hearing of this cause Lord Hardwicke, L.C., declared that the settlement in 1723 was a revocation of the will as to the freehold and leasehold estates comprised in that settlement, and as to the legacy of £6,000 bequeathed to the plaintiff; but as to all freehold and copyhold lands not comprised in the said settlement, they belonged to Jane and her heirs, by virtue of the will. His Lordship decreed that the defendant Jane should come to an account for the rents and profits of the premises comprised in the settlement of 1723, since the testator's death: the defendant was, in the first place, out of the rents and profits, to deduct and retain to her own use £500 per annum: and in the next place she was to deduct £293 for fines and charges of renewing the leasehold estate; and also to retain £80 per annum for the maintenance of the plaintiff: and the defendant Jane was to account annually for the said rents and profits, and to make the like deductions.

The plaintiff petitioned for a re-hearing, showing that accounts had been taken by the Master since the decree and he had made his report; whereby it was stated that the rents and profits had been yearly deficient to answer the £500 per annum, the £80 per annum, and the fines, so that there was a balance due to the defendants of £3,937 which they were to retain out of the next rents and profits; and in consequence of this, if the defendant Jane was to live a few years longer, and such arrears were considered as a charge upon the freehold and leasehold estates, the plaintiff would be deprived of her portion of £6,000 and also of her inheritance.

LORD HARDWICKE, L.C.—This cause comes to be re-heard after a great length of time, but that is no objection as the plaintiff was at the original hearing an infant, and is only now just of age.

Two things which have been mentioned may be laid out of the case, first, that it appears there was some surprise upon the court; secondly, that things were not rightly stated. I have read over the copy of the decree and it does appear to me that the material things were before the court. The same points were insisted on

A then as are now, and, therefore, I cannot impute any improper management to the cause in order to prejudice the infant. However, if the court should have erred in their judgment, the plaintiff is entitled to have it set right.

The first objection to the decree is that there is no direction given for the payment of the Duchess of Athol's arrears of £500 per annum nor the arrears of £80 per annum charged on the real estate for the plaintiff's maintenance during her B minority. It appears that the real estate falls very short of answering all the charges upon it and, therefore, the plaintiff's counsel insist that she is entitled to have these deficiencies turned upon the personal and copyhold estates belonging to the late Mr. Lanoy her father because there is a covenant in the marriage settlement that in case his wife should survive her husband, then his heirs, executors, etc., should pay the £500 per annum to his wife, clear of everything except C the land-tax. Although there is this covenant, it is truly said by the defendant's counsel that the personal assets are not the original fund charged, and in that respect differs from a mortgage, or any other encumbrance, for there being a borrowing and a lending in the case of a mortgage, the real estate is considered only as a pledge; and the personal estate, which is the natural fund, is liable in the first place; but this rule has never been carried so far as to extend it to a provision D upon a settlement.

Then consider this upon the first settlement, which was in consideration of marriage, and is a good one, although the wife brought no fortune at the time; Mr. Lanoy creates a charge of £500 per annum upon his real estate, as a jointure for his wife, and subject thereto, to the heirs male of his body, and in default of such issue to his own right heirs. Suppose a much stronger case than the present, E that there had been a son, who would have taken per formam doni under the settlement; and yet would he have had the real estate disencumbered out of the personal? There is no pretence to say he would; there never was, nor ever will be such a decree. A fortiori, the plaintiff is not entitled to it under the first settlement, as she takes only as heir-at-law.

Consider it next under the second settlement. The husband and wife levy a F fine and make a new settlement, the limitations of which were to himself for life, and to his wife for life, then a term of 200 years to raise a portion of £6,000 for daughters, whether any sons or not, and subject thereto, to the heirs of the body of the husband. Under this settlement what ground has the plaintiff to have the real estate disencumbered out of the personal? She does not, in the first place, take as a purchaser, for it is a settlement after marriage: there is no limitation G to the first and every other son, no limitation to the heirs of their two bodies, but a general limitation to the heirs of his body.

Now by virtue of this settlement, if Mr. Lanoy had survived his wife and married again, it would have gone to the eldest son of his second wife and not to the plaintiff. But still I am of opinion there is an equity for the plaintiff, and that is in respect of the £6,000 portion. By the first settlement there is no H provision by way of portion at all; then afterwards comes this great accession of fortune to the wife from her father, Mr. Frederick. Suppose Mr. Lanoy was entitled to this addition in his own right, or in the right of the wife only, he was either way justified in making the second settlement.

The plaintiff is a daughter, and a child, and in this court considered in the nature of a creditor for the portion. If that be so, what will be the effect of it in equity? I By the Master's state of the account, there are great arrears of the £500 per annum jointure upon the wife, and likewise of the £80 per annum maintenance for the plaintiff, almost a deficiency of £4,000 which must run on as a burden upon the inheritance and, as has been truly said, it must exhaust the inheritance if the Duchess of Athol should live to be very old, which, in the course of nature, she may do. The duchess has two funds, real and personal assets, to answer her demands, the plaintiff has only one. Is it not then the constant equity of this court that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien?

Suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons. Therefore, I am of opinion that so far as will secure the plaintiff her £6,000 fortune, she ought to be considered as a creditor, and entitled to turn the duchess upon the copyhold and personal estates. There is a very strong case of a portion, *Reeve* v. *Reeve* (1), where the court proceeded upon the same foundation as I do now.

The next consideration is as to the £80 yearly maintenance. There is no ground, as it stands only upon the settlement, to say it can be a charge upon the personal estate. But then it may be likewise put upon the same foot as the portion for, as to compelling the mother to maintain her daughter out of her own estate, it will be going too far, and, therefore, I shall lay that out of the case. The utmost this court does is in the case of an elder brother, where it directs the Master to make a larger provision for him, that he may be enabled to maintain his younger brothers, as he is the head of the family, and the housekeeper.

I think these are all the points, except the question which relates to the stock and annuities standing in the joint names of the husband and wife at Mr. Lanoy's death. Mr. Lanoy married his lady at a time she had no portion and made a settlement upon her in consideration of marriage only. By the determination of the question in *Frederick* v. *Frederick* (2), the Duchess of Athol became entitled to a fifth of a fifth of the father's customary estate, so that, by virtue of the decree, she was let into a very great fortune,which was directed to be paid to her only, but the stock, notwithstanding, was transferred to the husband and wife. If nothing more had been done, the husband to be sure might have disposed of it as he pleased; but if he made no alteration, she would certainly have been entitled to it on the foot of the transfer. But it does not rest there, for the second settlement was made afterwards, reciting that Mr. Lanoy, in the right of his wife, having become entitled to exchequer annuities, and money to the value of £1,600, the limitation under it are in strict tail, and provisions for daughters.

Mr. Lanoy dies in the life of the wife, leaving the stocks and annuities unaltered, which in law is considered as surviving to the wife. But by the plaintiff's counsel it is insisted that although in point of law it survives, yet by the equity of this court the husband, in consideration of the second settlement, is become a purchaser. But, upon looking into the cases, I own I cannot carry it so far as to take it from the mother and give it to the daughter as the personal estate of the father. I believe, where the settlement made by a husband has not been adequate to the wife's fortune, this court has, notwithstanding, decreed that he shall have her portion: but then all these cases are upon settlements before marriage, and I cannot find it so determined where it is a voluntary settlement after marriage.

Then apply those authorities to the present case. The second settlement was upon a very great accession of fortune to the wife, after she had been married some time, but is by no means adequate to the addition; for there is nothing new under this settlement, except the provision for the daughter's fortune; for the jointure to the wife is the same, and is no greater upon the husband's estate than before. The provision for the daughter has nothing to do with the general rule of a settlement equivalent to the fortune the father had with the mother. What I go upon is this, that here there was no contract on the part of the wife, she was incapable of contracting herself, neither had she a father or guardian to contract for her. If there had been any application to this court with regard to the second settlement in Mr. Lanoy's lifetime, the court would have directed the Master to see if the husband had made an adequate settlement; and the court would have asked the wife, who was of age, by way of analogy to passing the fine, whether she consented her fortune should be settled in this manner, and then the

A wife would have been bound by such consent and agreement. But to say that she is bound without the intervention of this court, or without her own agreement, is carrying it too far.

Adams v. *Cole* (3), before LORD TALBOT, is, indeed, very strong; but then it was a settlement made after, upon an agreement before marriage; and LORD TALBOT laid the stress altogether upon its being the express agreement of the parties and B for that reason decreed for the representative of the husband against the representative of the wife. But in the present case the wife was incapable of contracting, being under coverture: and what makes it a great deal stronger is that it may be collected from the transactions themselves that it was the intention of the parties that the duchess should have this money: for Mr. Lanoy having the power over the property of the wife, was a very sufficient consideration for what he has done C for the wife on the second settlement. Yet he has suffered it to stand unaltered all his lifetime, and even after his death, then why should the court take it contrary to the intention of the testator from the mother, and give it to the daughter?

Therefore, I must decree the Master to see what is due for the plaintiff's arrears of maintenance, and if mortgaging or selling the 200 years terms shall not be sufficient to satisfy the arrears and the £6,000, then the Master to take an account D of the personal and copyhold estates of Mr. Lanoy, that the plaintiff may be satisfied there, if the real estate should not be sufficient.

HIS LORDSHIP directed an account of what was due for the portion of £6,000, and also for the rentcharge of £500 a year. He also directed the estates to be sold, and, with the consent of the defendants, ordered a value to be set on the annuity of £500; and that the money arising by such sale or sales should, in the first place, E be applied to pay the value of the said annuity, and, in the next place, the arrears of maintenance, and then the portion of £6,000 and interest: and in case the money arising by such sale shall not be sufficient to answer the £6,000 and interest, then the plaintiff is to stand in the place of the defendant the Duchess of Athol, to have the benefit of the covenants contained in the settlement of Jan. 29, 1718, for payment of the annuity, and by virtue thereof to receive a satisfaction for the F deficiency of her portion of £6,000 and interest out of the personal estate of her father James Lanoy; and if the personal estate should prove deficient, then out of the freehold and copyhold estate devised by the will for the payment of debts.

A

REVEL *v.* WATKINSON AND ANOTHER

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), June 11, 1748]

[Reported 1 Ves. Sen. 93; 27 E.R. 912]

Settlement—Capital or income—Apportionment between—Arrears of jointure rentcharge—Interest on arrears not discharged by former life tenant—Application by second life tenant for payment of arrears and intrest out of past income.

B

Land was devised on trust to pay debts, with powers of leasing, mortgage and sale, and subject thereto in strict settlement on the testator's daughter for life, remainder to his brother for life, with remainder over. The testator was survived for two years by his widow, whose jointure, under a prior settlement, left insufficient income to pay interest on the debts, and arrears of interest accrued. After her death the income was more than sufficient, but at the daughter's death the arrears remained, and the testator's brother claimed to have £400, distributed by the trustee in his lifetime, applied towards them.

C

Held: (i) the whole estate was liable for the debts, but as between the beneficiaries life interests were chargable only with the interest as confirmed by the express powers of mortgage and sale; (ii) the daughter's interest under the will being one and indivisible, the surplus income after the jointress died must go to reduce the arrears accruing in her lifetime; (iii) during her mother's lifetime the daughter was entitled to maintenance from the estate.

D

Notes. Referred to: *Burges* v. *Mawbey* (1823), Turn. & R. 167; *Playfair* v. *Cooper* (1853), 1 Eq. Rep. 137; *Re Hotchkys*, *Freke* v. *Calmady* (1886), 55 L.T. 110 (see [1886–90] All E.R.Rep. 1104); *Honywood* v. *Honywood*, [1902] 1 Ch. 347; *Chapman* v. *Chapman*, [1954] 1 All E.R. 798.

E

As to outgoings payable out of income, see 34 HALSBURY'S LAWS (3rd Edn.) 637 et seq.; and for cases see 40 DIGEST (Repl.) 755.

F

Cases referred to:

(1) *Ivy* v. *Gilbert* (1722), Prec. Ch. 583; 2 P.Wms. 13; 24 E.R. 261, L.C.; affirmed sub nom. *Ivie* v. *Gylberte* (1723), 6 Bro. Parl. Cas. 68, H.L.; 40 Digest (Repl.) 666, *1591.*

(2) *Butler* (*of Woodhall*) *Case* (circa 1712), cited 1 Ves. Sen. 95; 27 E.R. 913, L.C.; 47 Digest (Repl.) 90, *626.*

G

Bill claiming to have £400, distributed by a trustee, applied in payment of the arrears of interest on the testator's debts.

The testator, Robert Revel, by his will devised his estate in trust out of the rents and profits to raise by leasing, mortgage or sale, enough to pay what his personal estate should be deficient to pay and subject thereto in trust for his only daughter in strict settlement, remainder in strict settlement to his brother, remainder over. The estate devised to the daughter was not sufficient to keep down the interest during the life of the mother, who had a jointure upon the estate by a prior settlement, although, upon her jointure falling in, it was more than sufficient. But, the mother living two years, arrears of interest accrued. The daughter married the defendant Pegg, and died without issue. The brother of the testator brought an action to have £400, which had been paid by the trustee to the defendant Pegg, applied in payment of the debts.

H

I

LORD HARDWICKE, L.C.—Two things are very plain. First, that originally, and according to the nature of this trust and course of this court, the plaintiff has a right to have this £400 so applied; but secondly, it is as plain on the part of the defendant, that although the whole estate is liable in respect of creditors yet, as between tenant for life and him in reversion, the tenant for life is only obliged to keep down the interest: for the court will not construe it so as to exhaust the profits during his life, without something particular. The word "leasing" makes

A no difference "mortgage or sale" coming after: and wherever those words are inserted, there is no instance of the court obliging a tenant for life to do more than keep down the interest, unless there are particular directions that all the profits should be applied. The reason of the determination in *Ivy* v. *Gilbert* (1) was that although the words "rents" and "profits" used generally without more imply a power to sell, yet the testator had there explained and restrained it by the B subsequent word "leasing": but no doubt was made that if the words "mortgage or sale" were added the inheritance should have borne the burden.

The next question, although new in specie, is also clear: whether, here being comprised in the trust an estate in possession, and also in reversion (on the death of the jointress) which, when it fell into possession, would be liable to the same trust, the tenant for life is bound to keep down the interest only, as the profits C came into possession from year to year: or whether the whole profits, as far as they will go during the estate for life, should be so applied to answer the deficiency in the mother's life. Next, taking it either way, whether the daughter was entitled to any allowance of maintenance during the mother's life?

As to the first, I am of opinion that the whole profits during the continuance of the estate for life should be applied to keep down the interest during that estate. D It is only by construction in equity that tenant for life should pay only the interest; as otherwise the creditor would come upon him for the principal. If there is a tenant for life, remainder for life, and during the first estate for life the whole profits are not sufficient to answer the interest of the debts, so that there is an arrear, I agree to what is said for the defendant, that it shall be a charge upon the inheritance when it is by the same settlement; the tenant for life being then E only obliged to keep down the interest incurred during his own life. But that is not the present case, for here the mother's estate for life was by another settlement; during whose life the profits of the estate in possession were not sufficient to keep down the interest, but afterwards more than sufficient. That surplus being an accruer to the trust estate must be applied to answer the former deficiency; and the trust must be considered as entire during the daughter's estate for life. Any F other construction would create inconvenience and confusion; for these trust estates partly in reversion and partly in possession are very frequent: and if the tenant for life, upon estates dropping in, should receive the profits from the fines, and let out at a rack-rent, without applying the profits to the arrears incurred before, there would be a great arrear upon the remainderman. Nay, were the estate accidentally improved, it ought to be so applied; or if a loss happened by tenants, the profits G coming in afterwards should be so applied.

But then the daughter must be allowed a maintenance out of this trust estate during the mother's life, for she stands entirely in the light of a child unprovided for during that time and at the mother's pleasure: and the court will not, in favour of a remainderman, suffer all the surplus profits to be exhausted to discharge the interest in exoneration of the estate, and leave a daughter and heir-at-H law to starve. For this I can cite a stronger case, *Butler (of Woodhall) Case* (2) before Lord Harcourt, where, though it was in the case of a nephew, and all the profits of the estate devised subject to the trust of payment of debts, yet the court held the uncle could not intend his nephew should starve; and directed a reasonable maintenance to be paid him out of the profits, it appearing the creditors were safe or submitting to it. Then surely the court will do it for a child, and when the I distribution of it is in the power of the court: and a legacy to a child payable at a future day shall carry interest, where it would not in the case of another person. On this footing must the account be taken.

KEEBLE *v.* HICKERINGILL

[Court of Queen's Bench (Sir John Holt, C.J., Powell, Powys and Gould, JJ.), Trinity Term, 1706]

[Reported 11 East, 574; 11 Mod. Rep. 73, 130; Holt, K.B. 14; 3 Salk. 9; Kel.W. 273; 103 E.R. 1127]

Tort—Interference with use of property—Lawful act by owner—Disturbance of enjoyment.

The plaintiff had a decoy pond on his property and the defendant fired guns on his own property for the purpose of scaring the wild duck from the pond. He did not enter the plaintiff's property and the plaintiff could not say how many ducks, if any, had in fact been prevented from coming to the pond.

Held: these facts gave rise to a right of action for injury in the enjoyment of a profitable piece of property, without alleging or proving the loss of any number of ducks.

Per Sir John Holt, C.J.: Every man that has a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. When a man uses his art or skill to take them, to sell and dispose for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him.

There are two sorts of acts for doing damage to a man's employment for which an action lies: the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege, whereby he has a fair, market or ferry, if another shall use the liberty, though out of his limits, he shall be liable to an action though by grant from the King. But therein is the difference to be taken between a liberty in which the public has a benefit, and that wherein the public is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession or way of getting his livelihood; there an action lies in all cases. But if a man does him damage by using the same employment, as if the defendant in the present case had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make and use a decoy as the plaintiff.

Notes. Distinguished: *Hannam* v. *Mockett* (1824), 2 B. & C. 934. Applied: *Ibbotson* v. *Peat* (1865), 34 L.J.Ex. 118. Considered: *Allen* v. *Flood*, [1895–9] All E.R.Rep. 52; *Hollywood Silver Fox Farm, Ltd.* v. *Emmett*, [1936], 1 All E.R. 825. Referred to: *Carrington* v. *Taylor* (1809], 11 East, 571; *Pannell* v. *Mill* (1846), 3 C.B. 625; *Rogers* v. *Rajendro Dutt* (1860), 8 Moo. Ind. App. 103; *Higgins* v. *O'Donnell* (1870), 18 W.R. 378; *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1891–4] All E.R.Rep. 263; *Trollope* v. *London Building Trades Federation* (1895), 11 T.L.R. 228; *Quinn* v. *Leathem*, [1900–3] All E.R.Rep. 1; *The Tubantia*, [1924] All E.R.Rep. 615.

As to interference with another's property, see 37 Halsbury's Laws (3rd Edn.) 123, 124. For cases see 45 Digest (Repl.) 281, 282.

Cases referred to:

(1) *Prior of Nedeport* v. *Weston* (1443), Y.B. 22 Hen. 6, fo. 14, pl. 23; 2 Roll. Abr. 140, pl. 4; 16 Vin. Abr. 26, pl. 4; 24 Digest (Repl.) 1150, *112*.

(2) *Gloucester Grammar School Case* (1410), Y.B. 11 Hen. 4, fo. 47; pl. 21; 36 Digest (Repl.) 252, *34*.

(3) *Dent* v. *Oliver* (1607), Cro. Jac. 122; 79 E.R. 106; 33 Digest (Repl.) 476, *312*.

(4) *Playter's Case* (1583), 5 Co. Rep. 34 b.
(5) *Escot* v. *Laureny* (1595), Owen, 109.
(6) *Johns* v. *Wilson* (1617), Cro. Jac. 435.
(7) *Lodge* v. *Weeden* (1647), Aleyn, 22.
(8) *Earl of Shrewsbury's Case* (1610), 9 Co. Rep. 42 a, 46 b; 77 E.R. 798; 13 Digest (Repl.) 42, *559*.
(9) *Dawney* v. *Dee* (1620), Cro. Jac. 605; 79 E.R. 517; sub nom. *Dawtree* v. *Dee*, J.Bridg. 4; Palm. 46; 2 Roll. Rep. 139; 19 Digest (Repl.) 505, *3426*.

Motion in arrest of judgment in an action for disturbing wild ducks from a decoy pond.

The plaintiff declared that he was on Nov. 8, 1703, lawfully possessed of a close of land called Minott's Meadow, and had a vivarium, i.e., a decoy pond therein to which divers wildfowl used to resort and come; and the plaintiff had at his own cost and charge prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them. The defendant, knowing this, and intending to damnify the plaintiff in his vivary, and to frighten and drive away the wildfowl used to resort thither, and deprive him of his profit, on Nov. 8, 1703, resorted to the head of the said pond and vivary, and discharged six guns laden with gunpowder, and with the noise and stink of the gunpowder drove away the wildfowl then being in the pond, and on Nov. 11 and 12 the defendant, with design to damnify the plaintiff, and frighten away the wildfowl, placed himself with a gun near the vivary, and there discharged the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl were frightened away, and forsook the said pond. Upon Not Guilty pleaded, a verdict was found for the plaintiff and £20 damages.

Sir James Montagu for the defendant.
Raymond for the plaintiff.

SIR JOHN HOLT, C.J., delivered the following judgment of the court: I am of opinion that this action does lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, (i) this using or making a decoy is lawful; (ii) this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment.

As to the first. Every man that has a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. When a man uses his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. [But see s. 3 of the Trade Disputes Act, 1906, as to acts done in furtherance of a trade dispute.] Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not effect any damage, yet are they mischievous in themselves: and, therefore, in their own nature productive of damage; and, therefore, an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; to say a merchant is broken, or that he is failing, or is not able to pay his debts: 1 ROLL. 60, 1; all the cases there put. How much more, when the defendant does an actual and real damage to another when he is in the very act of receiving profit by his employment.

There are two sorts of acts for doing damage to a man's employment for which an action lies: the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he has a fair,

market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action though by grant from the King. But therein is the difference to be taken between a liberty in which the public has a benefit, and that wherein the public is not concerned: Y.B. 22 Hen. 6, fo. 14, pl. 23 (*Prior of Nedeport* v. *Weston* (1)). The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man does him damage by using the same employment, as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make and use a decoy as the plaintiff. This is like the case in Y.B. 11 Hen. 4, fo. 47, pl. 21 (*Gloucester Grammar School Case* (2)). One schoolmaster set up a new school to the damage of an ancient school, and thereby the scholars were allured from the old school to come to his new. The action there was held not to lie. But suppose Mr. Hickeringill should lie in the way with his guns, and frighten the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. YEAR BOOK 29 Edw. 3, 18: A man has a market, to which he has toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies because it imports damage. An action upon the case lies against one that shall by threats fright away his tenants at will: YEAR BOOKS 9 Hen. 7. 8; 21 Hen. 6, 31; 9 Hen. 7, 7; 14 Edw. 4, 7. Vide RASTELL 662. In *Dent* v. *Oliver* (3) trespass was brought for beating the plaintiff's servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.

There was an objection that did occur to me, though I do not remember it to be made at the Bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frightened away by the defendant's shooting. As in *Playter's Case* (4). Trespass quare clausum suum fregit, et pisces suos cepit. After a verdict for the plaintiff, and entire damages, it was moved in arrest of judgment that the declaration was not good, because it was not said of what nature, nor of what number the fishes were; which was held to be a fatal exception, not helped after verdict by the Statute of Jeofails (18 Eliz., c. 14). The defendant says: but, indeed, here the number is not stated. Considering the nature of the case, it is not possible to declare of the number that were frightened away because the plaintiff did not have possession of them to count them. Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and, therefore, must know what he lost. This is plain by several authorities. *Dent* v. *Oliver* (3): Trespass for beating and hindering the plaintiff's servant from taking and collecting his toll; objection that it is not said what quantity of toll he was to take: but that could not be known. *Escot* v. *Laureny* (5); Action upon the case because the defendant hindered the plaintiff from taking toll of divers pieces of wool, and the plaintiff did not show how many; yet the declaration was good. *Johns* v. *Wilson* (6); Trespass quare clausum fregit, et spinas suas ad valentiam succidit. Exception was taken to the declaration because the number of the thorns was not mentioned: yet held not to be a good exception. *Lodge* v. *Weeden* (7): Action upon the case; the plaintiff declared that the defendant killed divers cattle infected with the murrain, and threw the entrails into the plaintiff's field, per quod diversa averia of the plaintiff's interierunt. After verdict, exception was taken in arrest of judgment, because it did not appear how many cattle of the plaintiff's did thereby perish; yet judgment was given for the plaintiff, because there need not be such certainty in an action upon the case, because the plaintiff is only to recover damages for them. *Shrewsbury's Case* (8): Action on the case for hindering the plaintiff in taking the profits of his stewardship of such a manor; not showing what the profits were, or how much they amounted to: it was never questioned but the declaration was good.

The plaintiff in this case brings his action for the apparent injury done him in the

A use of that employment of his freehold, his art, and skill that he uses thereby. Secondly, says counsel for the defendant, here the nature of the wildfowl is not stated, for wildfowl are of several sorts: ducks, teal, mallard, and, indeed, all birds that are wild are wildfowl. It is true in the large signification of the word they are so: and also the word fowl comprehends all birds and poultry: but wildfowl are taken in a more restrained sense; pheasants and partridges are not thereby under-
B stood, for they are fowl of warren: Manwood's Forest Law, cap. 4, s. 3, 1; Register, 93, 96; Fitzherbert's Natura Brevium, 86; Rastell, 585. Wildfowl are known in the law, and described by the statute of 25 Hen. 8, c. 11, which takes notice of wildfowl. The title of the statute is "against destroying of wildfowl." It recites that there has been within this realm great quantities of wildfowl, as ducks, mallards, wigeons, teals, wildgeese and divers other kind of wildfowl, which is
C reasonable to be understood of that sort that do get their prey in that manner. The statute 3 & 4 Edw. 6, c. 7, which repeals that of 25 Hen. 8, c. 11, takes notice of wildfowl, and has the general word "wildfowl," without coming to particulars. Therefore, when the declaration is of wildfowl, it is not to be understood that sparrows, wrens, or robin-redbreasts can be thereby included. Besides, Fluminex Volucres, in Littleton's Dictionary, are understood wildfowl, as being the only
D words in Latin that we have to express it. Littleton's Dictionary tit. Wild Fowl. And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expense of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto;
E that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But, in short, that which is the true reason, is, that this action is not brought to recover damages for the loss of the fowl, but for the disturbance; as *Dawney* v. *Dee* (9). So is the usual and common way of declaring.

A

COPPIN *v.* COPPIN

[Lord Chancellor's Court (Lord King, L.C.), June 25, 1725]

[Reported 2 P.Wms. 291; Cas. temp. King, 28; 24 E.R. 735]

B

Administration of Estates—Order of application of assets—Composition of debts by creditors—Direction in will to pay balance—Executor entitled under contract with deceased for sale of land—Land descending to executor as heir—Insufficiency of estate for payment of debts and legacies.

A testator, having contracted to buy land from his brother, the defendant, for £4,000, did not pay the whole of the price although a conveyance had been executed and endorsed with a receipt, and left the defendant in receipt of the rents as his agent. He died abroad having made a will which was insufficiently executed to dispose of English land according to the law at that time, and which, after considerable legacies, purported to leave the land (among other property) to the defendant on trust to pay "what I owe to my creditors at Aleppo, who have been so kind as to compound my debts with me at 10s. in the pound, and they to be paid without interest." He appointed the defendant executor and residuary legatee. The personal estate was not sufficient to pay all the legacies and the defendant pleaded that he had overpaid the legatees on a misrepresentation of the value of the estate. The legatees claimed the balance of the legacies, the creditors claimed the balance of their debts and to be paid in priority to the other legatees, and the defendant, by a cross-action, claimed a refund of the overpayments and to retain the balance of the purchase price of the land although he again succeeded to it as heir.

C

D

E

Held: (i) the defendant as vendor was entitled to have the balance of the purchase-money paid by the executor out of the personal estate, and as heir he was entitled to succeed to the land, and it made no difference that he was at once vendor, executor and heir; (ii) the creditors, having compounded the debts, were no longer entitled as creditors but only under the provisions of the will, which gave them no priority; (iii) the defendant was not entitled to repayment of money overpaid, the mistake not having been induced by any fraud or misrepresentation by the legatees, and the defendant, as executor, being the person who should have known what were the testator's circumstances.

F

Notes. As to abatement of legacies, see 16 Halsbury's Laws (3rd Edn.) 330; and for cases see 23 Digest (Repl.) 435.

G

Cases referred to:

(1) *A.-G.* v. *Robins* (1722), 2 P.Wms. 23; 24 E.R. 627.

(2) *Masters* v. *Masters* (1717), 1 P.Wms. 421; 24 E.R. 454; 23 Digest (Repl.) 538, *6033*.

Bills to have the rights of the parties in the testator's estate ascertained.

H

Francis Coppin, the younger brother of the defendant John Coppin, having been unsuccessful in the earlier part of his life and contracted several debts and failed in the world, and compounded his debts at 10s. in the pound, by the assistance of his elder brother, the defendant John Coppin, at length got an interest in the East India Co., who employed him as one of their supercargoes to Persia, where having acquired a very considerable personal estate, he wrote to his elder brother to find him a property to purchase. The defendant, his elder brother, thereupon proposed to sell him an estate of his own at Emberton in Buckinghamshire for £4,000, the said Francis Coppin to enter upon the premises as at Michaelmas, 1718; which proposal by several subsequent letters was accepted by Francis Coppin. Afterwards Francis Coppin made his will, whereby he gave several considerable legacies, and then came the following words:

I

"Whatsoever shall remain in money, lands and goods, I give the same to my brother John Coppin, who thereout is to pay what I owe to my creditors

A at Aleppo, who have been so kind as to compound my debts with me at 10s. in the pound, and they to be paid without interest."

He then made the defendant John Coppin his executor and residuary legatee. The will had only two witnesses, and was made abroad during the said Francis Coppin's return voyage from Persia. [By the law at that time, a will of land required
B three witnesses.]

The purchase before agreed upon was executed in the lifetime of the testator Francis and the defendant John Coppin, the vendor, gave a receipt for the £4,000 purchase-money on the back of the purchase deed; but in evidence he swore that he never then nor afterwards received any part of the purchase-money other than such sum as appeared on an account set forth by him; and this seemed admitted
C by a letter of the testator Francis Coppin, who died abroad on his way home from Persia without wife or issue, leaving the defendant John Coppin his elder brother and heir.

Three actions were then brought. In one the legatees claimed their legacies (of which the executor, the defendant John, had paid about half), the said legatees suggesting that this purchase was made by the defendant John Coppin for his
D brother, in which the defendant (as was objected) acted both as vendor and vendee, and that the deeds of purchase, having continued in his hands to the time of the said testator's death, was a fraudulent purchase as against the legatees. The second bill was brought by the compounding creditors, on a suggestion that their demands being originally debts, and what the testator thought in his conscience he was still obliged to pay, they continued to be debts in a conscientious view,
E though in law released, and, therefore, were superior in their nature to legacies, for which reason they prayed that these might have the preference in payment, insisting further that it was not material that those debts were in law released, if the testator thought them debts in conscience, and would not take the advantage of the release made to him by his said creditors, which he was not bound to do. The third bill was preferred by John Coppin, the heir and executor, alleging that
F he had paid the legatees more than the assets would extend to pay, merely on a misrepresentation of the value of the testator's personal estate, which had suffered unexpected losses, and, therefore, insisting that if he, through importunity or kindness to several of the legatees who were his relations, had made payment of legacies beyond the assets, such overpayments should be refunded.

G **LORD KING, L.C.**—The only matter which makes the difficulty in this case is that here both heir and the executor of the testator happened to be one and the same person, and likewise the vendor of the land; but this must be considered in the same light as if there were several persons, and cum duo jura in una persona concurrunt æquum est ac si essent in diversis. Taking it that there were several, one the heir, the other executor, and the defendant John Coppin a third person, neither heir nor executor, but vendor, the person who was heir would have a plain
H title to the land purchased, the person who was executor must out of the testator's personal assets have paid the residue of the purchase-money to the defendant John Coppin, the vendor, who would have as plain a title to receive it. Under those circumstances everything would have been so plain as to have admitted of no dispute, and in justice and reason it ought to make no difference (the facts
I being clear) that the same person happens to be the vendor, and afterwards the heir and executor of the vendee.

As to the second point, the compounding creditors having once released their debts, which thereby became extinct, they are out of the case as creditors, and must now claim as voluntary legatees, and can have no other title than to legacies in such manner as given by the will. The testator might easily and by express words have given them the preference, if he had so intended; but it would be dangerous to make a construction beyond the words of the will, that being to make a new will for the testator. If one gives a legacy to a charity, it is not to be

preferred to other legacies, unless expressly so directed by the will: *A.-G.* v. *Robins* (1); *Masters* v. *Masters* (2).

As to the last point, viz., the defendant John Coppin's crossbill, by which he prayed to be repaid the legacies which through misrepresentation he had paid, there does not appear to have been any fraud or misrepresentation made use of by the legatees to whom these payments were made, and as there is much more reason to think that the defendant John Coppin, the executor, was cognisant of and informed concerning the testator's circumstances than the legatees, I would order no refunding, and, it being a hard case, no costs on either side.

Judgment for defendant on claims; defendant's cross-claim dismissed.

SIX CARPENTERS' CASE

[Court of Common Pleas (Sir Edward Coke, C.J., and other judges), Michaelmas Term, 1610]

[Reported 8 Co. Rep. 146a; 77 E.R. 695]

Trespass—Trespass ab initio—Abuse of lawful authority—Act of omission.

When an entry, authority or licence is given to anyone by the law and he abuses it, he is a trespasser ab initio. An act of omission cannot make a person who has authority or licence by law a trespasser ab initio.

Distress—Distress for rent—Right to distrain—Loss of—Tender of rent—Time for tender.

Tender on the land before the distress makes the distress tortious; tender after the distress and before the impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful.

Notes. Considered: *Horn* v. *Luines* (1700), 12 Mod. Rep. 352; *Ditcham* v. *Bond* (1814), 3 Camp. 524; *Shortland* v. *Govett* (1826), 5 B. & C. 485. Applied: *Evans* v. *Elliott* (1836), 2 Har. & W. 231. Considered: *Gulliver* v. *Cosens*, [1843–60] All E.R.Rep. 408; *West* v. *Nibbs* (1847), 4 C.B. 172; *Glynn* v. *Thomas* (1856), 11 Exch. 870; *O'Neil* v. *City and County Finance Co.* (1886), 17 Q.B.D. 234; *Elias* v. *Pasmore*, [1934] All E.R.Rep. 380; *Owen and Smith (trading as Nuagin Car Service)* v. *Reo Motors (Britain), Ltd.* (1934), 151 L.T. 274. Referred to: *Isaack* v. *Clark* (1615), 2 Bulst. 306; *Northampton Corpn.* v. *Ward* (1745), 2 Stra. 1238; *Austin* v. *Whittred* (1747), Willes, 623; *Moyse* v. *Cocksedge* (1749), Willes, 636; *Gates* v. *Bayley* (1766), 2 Wils. 313; *Taylor* v. *Cole* (1791), 1 Hy. Bl. 555; *Phillips* v. *Bacon* (1808), 9 East, 298; *Winterbourne* v. *Morgan* (1809), 11 East, 395; *Kerbey* v. *Denby* (1836), 1 M. & W. 336; *Smith* v. *Egginton* (1837), 7 Ad. & El. 167; *Harvey* v. *Pocock* [1843–60] All E.R.Rep. 412; *Jacobsohn* v. *Blake* (1844), 6 Man. & G. 919; *Webster* v. *Watts* (1847), 17 L.J.Q.B. 73; *King* v. *Rochdale Canal Co.* (1851), 15 Jur. 896; *Ambergate etc., Rail. Co.* v. *Midland Rail. Co.* (1853), 2 E. & B. 793; *Long* v. *Clarke* (1893), 42 W.R. 130; *Durant & Co.* v. *Roberts and Keighley, Maxsted & Co.*, [1900] 1 Q.B. 629; *Hickman* v. *Maisey* (1900), 69 L.J.Q.B. 511.

As to how the right to distrain may be lost, see 12 Halsbury's Laws (3rd Edn.) 118 et seq.; and for cases see 18 Digest (Repl.) 312 et seq. As to trespass ab initio, see 38 Halsbury's Laws (3rd Edn.) 747; and for cases see 46 Digest (Repl.) 374, 375.

A Case referred to:

(1) *Pilkington's Case* (1601), 5 Co. Rep. 76 a; 77 E.R. 169; sub nom. *Pilkington* v. *Hastings*, Cro. Eliz. 813; 18 Digest (Repl.) 443, *1872*.

Action of trespass brought by the plaintiff, John Vaux, against the defendants, Thomas Newman, carpenter, and five other carpenters, for breaking into his house called the Queen's Head, and for an assault and battery.

B The defendants to all the trespass præter fractionem domus pleaded not guilty, and as to the breaking into of the house said that the said house at the said time, for a long time before, and afterwards, was a common wine tavern of the plaintiff, with a common sign fixed at the door by force whereof the defendants entered the house, the door thereof being open, and bought and drank a quart of wine for which they paid. The plaintiff, by way of replication, admitted that the house C was a common tavern, and that the defendants entered it and bought and drank a quart of wine and paid for it; but he further said that one John Ridding, servant of the plaintiff, at the request of the defendants then delivered to them another quart of wine and a pennyworth of bread, amounting to 8d., and that they drank the said wine, and ate the bread and on request refused to pay for them; on which the defendants demurred in law.

D

SIR EDWARD COKE, C.J., in his report, said that the only point in this case was whether the refusing to pay for the wine, or non-payment, which was all one (for every non-payment, on request, was a denying in law) made the entry into the tavern tortious.

The court resolved first, that when entry, authority or licence is given to E anyone by the law and he abuses it, he shall be a trespasser ab initio; but where an entry, authority or licence is given by the party and he abuses it, there he must be punished for his abuse but shall not be a trespasser ab initio. The reason for this difference is that in the case of a general authority or licence of law, the law adjudges by the subsequent act, quo animo, or to what intent he entered for acta exteriora indicant interiora secreta: vide Y.B. 11 Hen. 4, 75 b. F But when the party gives an authority or licence himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence, and, therefore, the law gives authority to enter into a common inn or tavern, so to the lord to distrain; to the owner of the ground to distrain damage feasant; to him in reversion to see if waste be done; to the commoner to enter on the land to see his cattle, and such like: vide Year Books 12 Edw. 4, 8 b; G 21 Edw. 4, 19 b; 5 Hen. 7, 11 a; 9 Hen. 6, 29 b; 11 Hen. 4, 75 b; 3 Hen. 7, 15 b; 28 Hen. 6, 5 b. But if he who enters into the inn or tavern does a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress; or if he who enters to see waste breaks [into] the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases the law adjudges that he entered for that purpose and, H because the act which demonstrates it is a trespass, he shall be a trespasser ab initio, as it appears in all the books. So, if a purveyor takes my cattle by force of a commission for the King's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees Y.B. 18 Hen. 6, 19 b. Et sic de similibus.

I Secondly, it was resolved per totam curiam that not doing cannot make the party who has authority or licence by the law a trespasser ab initio, because not doing is no trespass and, therefore, if the lessor distrains for his rent and thereupon the lessee tenders him the rent and arrears, etc., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser ab initio; and therewith agrees Y.B. 33 Hen. 6, 47 a. So if a man takes cattle damage feasant and the other offers sufficient amends and he refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them and not for the taking, for that was lawful, and therewith agree

FITZHERBERT'S NATURA BREVIUM 69 G; temp. Edw. 1, Replevin 27; 27 Edw. 3, 88; 45 Edw. 3, 9. So in the case at Bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and, therefore, they cannot be trespassers ab initio; and therewith agrees directly in the point Y.B. 12 Edw. 4, 9 B. For there SERJEANT PIGOT puts this very case, if one comes into a tavern to drink and when he has drunk he goes away and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which BRYAN, C.J., said the case which SERJEANT PIGOT had put, was not law, for it was no trespass, but the taverner should have an action of debt; and there before BRYAN, C.J., held that if I bring cloth to a tailor to have a gown made, if the price be not agreed in certain before how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt, but the tailor in such a case shall have a special action of debt. Scilicet that A. did put cloth to him to make a gown thereof for A. and that A. would pay him as much for making and all necessaries thereto as he should deserve, and that for making thereof and all necessaries thereto he deserves so much, for which he brings his action of debt. In that case, the putting of his cloth to the tailor to be made into a gown is sufficient evidence to prove the special contract, for the law implies it, and if the tailor overvalues the making or the necessaries to it, the jury may mitigate it and the plaintiff shall recover so much as they shall find and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessaries thereof, he shall not have an action of debt for his own value and declare of a retainer of him to make a gown, for so much, unless it is so especially agreed. But in such case he may detain the garment until he is paid, as the hostler may the horse: vide, BR. Distress, 70, and all this was resolved by the court. Vide 30 Ass., fo. 179, pl. 38, *John Matrever's Case*; it is held by the court that if the lord or his bailiff comes to distrain, and before the distress the tenant tenders the arrears on the land, there the distress taken for it is tortious.

The same law for damage feasant, if before the distress he tenders sufficient amends; and therewith agrees Y.B. 7 Edw. 3, fo. 8, pl. 17, in the *Master of St. Mark's Case*, and so is the opinion of HULL to be understood in Y.B. 13 Hen. 4, fo. 17, pl. 14 B., which opinion is not well abridged in FITZ. ABR. tit. TRESPASS, pl. 180. NOTE, reader, this difference, that tender on the land before the distress makes the distress tortious; tender after the distress and before the impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law to be there determined. But after the law has determined it and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender he may have an action of detinue for the detainer after; or he may, on satisfaction made in court, have a writ for the re-delivery of his goods; and therewith agree the books in 13 Hen. 4, 17 B; 14 Hen. 4, 4; REGISTRUM JUDICIALIUM 37; 45 Edw. 3, 9, and all the books before. Vide 14 Edw. 4, 4 B; 2 Hen. 6, 12; 22 Hen. 6, 57; DOCTOR AND STUDENT, lib. 2, cap. 27; BR. Distress 72; and *Pilkington's Case* (1), in 5 Co. Rep. 76 a; and so all the books which prima facie seem to disagree are on full and pregnant reason well reconciled and agreed.

A

SCOTT *v.* SHEPHERD

[Court of Common Pleas (De Grey, C.J., Nares, Blackstone and Gould, JJ.), Easter Term, 1773]

[Reported 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525]

B *Trespass to the Person—Assault—Injury through act of defendant—Intervention of third persons.*

The defendant threw a lighted squib made of gunpowder into a market where a large concourse of people were assembled. The squib fell on the stall of Y. To prevent injury to himself and Y.'s goods W. took up the squib and threw C it across the market where it fell on the stall of R., who, to save his own goods, threw it across another part of the market, where it exploded and injured the plaintiff. In an action of trespass and assault the defendant pleaded that, as he had not directly hit the plaintiff, he was not liable.

Held: (Blackburn, J., dissenting): in order to maintain trespass it was not necessary for the defendant personally to have touched the plaintiff; he gave D the mischievous faculty to the squib and the mischief remained in it until the explosion; an innocent person (as W. and R. were) was justified in removing the danger from himself to another; the injury to the plaintiff was, therefore, the direct and immediate act of the defendant for which he was liable.

Notes. Considered: *Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1874), L.R. 9 Q.B. 263. Applied: *Clark* v. *Chambers*, [1874–80] All E.R.Rep. 253. Con- E sidered: *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B.D. 327. Applied: *H.M.S. London*, [1914] P. 72. Considered: *The Paludina*, [1924] All E.R.Rep. 697. Referred to: *Leame* v. *Bray* (1803), 3 East, 593; *Clifford* v. *Brooke* (1806), 13 Ves. 131; *Fitzsimons* v. *Inglis* (1814), 5 Taunt. 534; *Langridge* v. *Levy* (1837), 6 L.J.Ex. 137; *M'Laughlin* v. *Pryor* (1842), 4 Scott, N.R. 655; *Rich* v. *Basterfield* (1846), 2 Car. & Kir. 257; *Gilberton* v. *Richardson* (1848), 5 C.B. F 502; *Sharrod* v. *London and North Western Rail. Co.* (1849), 4 Exch. 580; *Coward* v. *Baddeley* (1859), 33 L.T.O.S. 125; *Seymour* v. *Greenwood* (1869), 6 H. & N. 359; *Clark* v. *Hoskins* (1868), 37 L.J.Ch. 561; *The George and Richard* (1871), L.R. 3 A. & E. 466; *Holmes* v. *Mather* (1875), 44 L.J.Ex. 176; *Latham* v. *Richard Johnson & Nephew, Ltd.*, [1911–13] All E.R.Rep. 117; *Ruoff* v. *Long* [1916] 1 K.B. 148; *Bradley* v. *Newsum, Sons & Co.*, [1918–19] All E.R.Rep. 625; *Weld-Blundell* G v. *Stephens*, [1920] A.C. 956; *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1925), 135 L.T. 83; *Singleton Abbey* (*Owners*) v. *Paludina* (*Owners*), *The Paludina*, [1926] All E.R.Rep. 220; *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R.Rep. 222; *Smith* v. *Davey, Paxman & Co.* (*Colchester*), *Ltd.*, [1943] 1 All E.R. 286; *Philco Radio and Television Corpn. of Great Britain, Ltd.* v. *J. Spurling, Ltd.* [1949] 2 All E.R. 882; *Gough v. National Coal Board*, [1953] H 2 All E.R. 1283; *Wormald* v. *Cole*, [1954] 1 All E.R. 683; *Southport Corpn.* v. *Esso Petroleum Co.*, [1954] 2 All E.R. 561; *Fowler* v. *Lanning*, [1959] 1 All E.R. 290.

As to assault and battery, see 38 Halsbury's Laws (3rd Edn.) 761 et seq.; and for cases see 46 Digest (Repl.) 418 et seq.

I Cases referred to:

(1) *Underwood* v. *Hewson* (1724), 1 Stra. 596; 93 E.R. 722; 46 Digest (Repl.) 416, *590.*

(2) *Weaver* v. *Ward* (1616), Hob. 134; 80 E.R. 284; 16 Digest (Repl.) 352, *4.*

(3) *Dickenson* v. *Watson* (1682), T.Jo. 205; 84 E.R. 1218; 46 Digest (Repl.) 416, *583.*

(4) *Reynolds* v. *Clark* (1725), Fortes. Rep. 212; 2 Ld. Raym. 1399; 8 Mod. Rep. 272; 1 Stra. 634; 92 E.R. 822; 36 Digest (Repl.) 256, *73.*

(5) *Preston* v. *Mercer* (1656), Hard. 60.

(6) *Courtney* v. *Collet* (1697), 1 Ld. Raym. 272; 12 Mod. Rep. 164; 91 E.R. 1079; 25 Digest (Repl.) 32, *325.*
(7) *Wheatley* v. *Stone* (1617), Hob. 180.
(8) *Dent* v. *Oliver* (1606), Cro. Jac. 122; 79 E.R. 106; 46 Digest (Repl.) 360, *76.*
(9) *R.* v. *Higgins* (1730), 17 State Tr. 309; 2 Ld. Raym. 1574; 1 Barn.K.B. 396; Fitz-G. 177; 2 Stra. 883; 92 E.R. 518; 2 Digest (Repl.) 328, *214.*
(10) *Parker* v. *Flint* (1699), 12 Mod. Rep. 254; Holt, K.B. 366; 88 E.R. 1303; sub nom. *Parkhurst* v. *Foster*, 1 Ld. Raym. 478; 5 Mod. Rep. 427; 1 Salk. 387; Carth. 417; 29 Digest (Repl.) 2, *6.*
(11) *Roswell* v. *Prior* (1701), Holt, K.B. 500; 12 Mod. Rep. 635; 90 E.R. 1175; sub nom. *Rosewell* v. *Prior*, 1 Ld. Raym. 713; 2 Salk. 460; 6 Mod. Rep. 116; 36 Digest (Repl.) 318, *640.*
(12) *Slater* v. *Baker* (1767), 2 Wils. 359; 95 E.R. 860; 33 Digest (Repl.) 531, *95.*
(13) *Haward* v. *Bankes* (1760), 2 Burr. 1114; 97 E.R. 740; 36 Digest (Repl.) 256, *73.*
(14) *Harker* v. *Birkbeck* (1764), 3 Burr. 1556; 1 Wm. Bl. 482; 97 E.R. 978; 33 Digest (Repl.) 784, *559.*
(15) *Bourden* v. *Alloway* (1708), 11 Mod. Rep. 180.
(16) *Gilbert* v. *Stone* (1647), Aleyn, 35; Sty. 72; 82 E.R. 902; 46 Digest (Repl.) 398, *394.*
(17) *Bessey* v. *Olliot and Lambert* (1682), T.Raym. 467; 83 E.R. 244; sub nom. *Lambert and Olliot* v. *Bessey*, T.Raym. 421; sub nom. *Olliet* v. *Bessey*, T.Jo. 214; sub nom. *Ollyett* v. *Bessey*, cited in 2 Lut. at p. 937; 17 Digest (Repl.) 78, *21.*
(18) *Gates* v. *Bayley* (1766), 2 Wils. 313; 95 E.R. 830; 18 Digest (Repl.) 446, *1896.*
(19) *Anon.* (1676), 1 Vent. 295; sub nom. *Michael* v. *Alestree*, 2 Lev. 172; sub nom. *Michell* v. *Allestry*, 3 Keb. 650.

Action of trespass and assault for throwing, casting and tossing a lighted squib at and against the plaintiff and striking him therewith on the face and so burning one of his eyes that he lost the sight of it. The defendant denied liability.

At the trial before NARES, J., the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the court on a case.

On the evening of the fair day at Milborne Port, Oct. 28, 1770, the defendant threw a lighted squib made of gunpowder, etc., from the street into the market-house which was a covered building supported by arches and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled. The lighted squib fell on the stall of one William Yates, who sold gingerbread, etc. One James Willis instantly, and to prevent injury to himself and the wares of Yates, took up the lighted squib from off the stall and then threw it across the market-house where it fell on another stall there of one Ryal, who sold the same sort of wares. He instantly and to save his own goods from being injured took up the lighted squib from off the stall and then threw it to another part of the market-house and, in so throwing it, struck the plaintiff then in the market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. The question for the opinion of the court was whether this action was maintainable.

Serjeant Glyn for the plaintiff.
Serjeant Burlard for the defendant.

Cur. adv. vult.

NARES, J.—I am of opinion that trespass would well lie in the present case. The natural and probable consequence of the act done by the defendant was injury to somebody, and, therefore, the act was illegal at common law. The throwing of squibs has by 9 Will. 3, c. 7 [Fireworks Act, 1697: repealed], been since made a nuisance. Being, therefore, unlawful, the defendant was liable to answer for the

consequences, be the injury mediate or immediate. YEAR BOOK 21 Hen. 7, 28, is express that malus animus is not necessary to constitute a trespass. So, too, *Underwood* v. *Hewson* (1); *Weaver* v. *Ward* (2); *Dickenson* v. *Watson* (3); Y.B. 6 Edw. 4, 7, 8; FITZ. ABR. Trespass, 110. The principle I go on is what is laid down in *Reynolds* v. *Clark* (4) (1 Stra. 634), that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in Y.B. 12 Hen. 4, fo. 3, pl. 4, trespass lay for stopping a sewer with earth so as to overflow the plaintiff's land. In Y.B. 26 Hen. 8, 8, for going on the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also *Preston* v. *Mercer* (5); REG. 108, 95; Y.B. 6 Edw. 4, fo. 7, pl. 18; *Courtney* v. *Collet* (6); *Wheatley* v. *Stone* (7); *Dent* v. *Oliver* (8); FITZHERBERT'S NATURA BREVIUM 202. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. Qui facit per aliud facit per se. He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it until the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages: so held in *R.* v. *Higgins* (9) (2 Ld. Raym. 1574); *Parkhurst* v. *Foster* (10) (1 Ld. Raym. 480); *Rosewell* v. *Prior* (11) (12 Mod. Rep. 639). And it was declared by this court, in *Slater* v. *Baker* (12), that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

BLACKSTONE, J. (dissenting): I am of opinion that an action of trespass does not lie for the plaintiff against the defendant on this Case. I take the settled distinction to be that, where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the Case: *Reynolds* v. *Clark* (4); *Haward* v. *Bankes* (13); *Harker* v. *Birkbeck* (14). The lawfulness or unlawfulness of the original act is not the criterion, although something of that sort is put into LORD RAYMOND'S mouth in *Reynolds* v. *Clark* (4) (1 Stra. 635), where it can only mean that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (on the defendant's own ground) and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule, for it is held by the court in the same case that if I throw a log of timber into the highway (which is an unlawful act) and another man tumbles over it and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground and I go thereon to fetch it, trespass lies. This is the case cited from Y.B. 6 Edw. 4, fo. 7, pl. 18. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognisance thereby, I shall have an action on the case: per POWELL, J., in *Bourden* v. *Alloway* (15) (11 Mod. Rep. 180). Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case.

The solid distinction is between direct or immediate injuries on the one hand and mediate or consequential on the other, and trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or the plaintiff. The tortious act was complete when the squib lay at rest on Yates's stall.

He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endanger others. But the defendant, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed on it, and the new direction given it, by either Willis or Ryal, who both were free agents and acted on their own judgment. This distinguishes it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the vis impressa, is continued, though diverted. Here the instrument of mischief was at rest until a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, until after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows and now lies still. Yet if any person gives that stone a new motion and does further mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against the defendant. And, according to the doctrine contended for, so may Ryal and the plaintiff. Three actions for one single act! nay, it may be extended in infinitum. If a man tosses a football into the street and, after being kicked about by one hundred people, it at last breaks a tradesman's windows, shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if the plaintiff has no action against the defendant, against whom must he seek his remedy? I give no opinion whether case would lie against the defendant for the consequential damage; though, as at present advised, I think that on the circumstances, it would. But I think that, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person, much less a fear of danger to either his goods or his person; nothing but inevitable necessity: *Weaver* v. *Ward* (2); *Dickenson* v. *Watson* (3); *Gilbert* v. *Stone* (16). So in the case put by Brian, J., and assented to by Littleton, J., and Choke, C.J. [in Y.B. 6 Edw. 4, fo. 7, pl. 18], and relied on in *Bessey* v. *Olliot and Lambert* (17) (T.Raym. at p. 468):

> "If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself."

But none of these great lawyers ever thought that trespass would lie by the person struck against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act.

But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt or his person injured, the defendant must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of the defendant nor the inevitable effect of it; much less the subsequent throwing by Ryal. *Slater* v. *Baker* (12) was first a motion for a new trial after verdict. In our case the verdict is suspended until the determination of the court. And though after verdict the court will not look with eagle's eyes to spy out a variance, yet,

A when a question is put by the jury on such a variance and it is made the very point of the cause, the court will not wink against the light and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. It was an action on the case that was brought, and the court held the special case laid to be fully proved. So that the present question could not arise on that action. The same evidence that will maintain trespass may also B frequently maintain case, but not e converso. Every action of trespass with a "per quod" includes an action on the case. I may bring trespass for the immediate injury and subjoin a "per quod" for the consequential damages; or may bring case for the consequential damages and pass over the immediate injury, as in *Bourden* v. *Alloway* (15) before cited. But if I bring trespass for an immediate injury and prove at most only a consequential damage, judgment must be for the C defendant: *Gates* v. *Bayley* (18). It is said by Lord Raymond, and very justly, in *Reynolds* v. *Clark* (4): "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I, therefore, think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained), I am of opinion that in this action judgment ought to be for the defendant.

D **GOULD, J.**—I am of the same opinion with Nares, J., that this action is well maintainable. The whole difficulty lies in the form of the action and not in the substance of the remedy. The line is very nice between case and trespass on these occasions. I am persuaded that there are many instances wherein both or either will lie. I agree with Nares, J., that, wherever a man does an unlawful E act, he is answerable for all the consequences; and trespass will lie against him if the consequence be in nature of trespass. But, exclusive of this, I think that the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed on Willis and Ryal excited self-defence and deprived them of the power of recollection. What they did was, therefore, the inevitable consequence of the defendant's unlawful act. F Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did was by necessity, and the defendant imposed that necessity on them. As to the case of the football, I think that if all the people assembled act in concert they are all trespassers (i) from the general mischievous intent; (ii) from the obvious and natural consequences of such an act; which reasoning will equally G apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land: *Preston* v. *Mercer* (5); *Courtney* v. *Collet* (6). I shall not go over again the ground which Nares, J., has relied on and explained, but concur in his opinion that this action is supported by the evidence.

H **DE GREY, C.J.**—This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass vi et armis lies against the person from whom it is received. The question here is whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with Black- I stone, J., as to the principles he has laid down but not in his application of those principles to the present case. The real question certainly does not turn on the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident, as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, etc. They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, etc. But the true question is whether the injury is the direct and immediate act of the defendant; and I am of opinion that in this case it is. The throwing the squib was an act

unlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief, therefore, follows he is the author of it; egreditur personam, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think that there is an analogy. Everyone who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter: FOST. 261. So, too, in 1 VENT. 295 (*Anon.* (19)), a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay: and, 2 LEV. 172 (same case sub nom. *Michael* v. *Alestree* (19)), that it need not be laid scienter. I look on all that was done subsequent to the original throwing as a continuation of the first force and first act which will continue until the squib was spent by bursting. I think that any innocent person removing the danger from himself to another is justifiable; the blame lights on the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the REGISTER, 95 a, for trespass in maliciously cutting down a head of water which thereupon flowed down to and overwhelmed another's pond shows that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with GOULD and NARES, JJ., that the present action is maintainable.

Judgment for plaintiff.

COOPER *v.* MARSHALL

[COURT OF KING'S BENCH (Lord Mansfield, C.J., Denison and Foster, JJ.), April 29, 1757]

[Reported 1 Burr. 259; 2 Keny. 1; 97 E.R. 303]

Commons—Commoner—Rights—Nuisance—Abatement—Damage to common—Rabbits—Right to fill up burrows.

A plea by a commoner in justification of trespass for filling up rabbit burrows on a common that it was done to abate a nuisance, **held** to be bad.

Notes. Applied: *Kirby* v. *Sadgrove* (1797), 3 Ast. 892. Considered: *Arlett* v. *Ellis*, [1824–34] All E.R.Rep. 294; *Coote* v. *Ford* (1900), 83 L.T. 482. Referred to: *Hope* v. *Osborne*, [1913] 2 Ch. 349.

As to rights and remedies of commoners, see 5 HALSBURY'S LAWS (3rd Edn.) 355 et seq., and for cases see 11 DIGEST (Repl.) 46 et seq.

Cases referred to:

(1) *Mason* v. *Cæsar* (1676), 2 Mod. Rep. 65; 86 E.R. 944; 11 Digest (Repl.) 49, *713*.

(2) *Carrill* v. *Pack and Baker* (1613), 2 Bulst. 115; 80 E.R. 996; 11 Digest (Repl.) 49, *701*.

(3) *Horsey* v. *Hagberton* (1609), Cro. Jac. 229; 79 E.R. 199; 11 Digest (Repl.) 49, *703*.

(4) *R.* v. *Pappineau* (1726), 2 Stra. 686; 2 Sess. Cas.K.B. 34; 93 E.R. 784; 36 Digest (Repl.) 301, *455*.

Also referred to in argument:

Ould and Conyes Case (1558), 4 Leon. 7; 74 E.R. 690; 11 Digest (Repl.) 49, *698*.

A *Coney's Case* (1587), Godb. 122; 78 E.R. 75; sub nom. *Anon.*, 2 Leon. 201; 11 Digest (Repl.) 49, *699*.

Pelling v. *Langden* (1601), Owen, 114; 74 E.R. 940; sub nom. *Bellew* v. *Langdon*, Cro. Eliz. 876; 11 Digest (Repl.) 49, *700*.

Hadesden v. *Gryssel* (1607), Cro. Jac. 195; 79 E.R. 170; sub nom. *Holdesden* v. *Gresil*, 1 Brownl. 208; sub nom. *Hoddesdon* v. *Gresil*, Yelv. 104; 11 Digest
B (Repl.) 50, *723*.

Smith v. *Fetherwell* (1675), 1 Freem.K.B. 190; 2 Mod. Rep. 6; 89 E.R. 135; 11 Digest (Repl.) 42, *574*.

Mary's Case (1612), 9 Co. Rep. 111b; 77 E.R. 895; sub nom. *Morris's Case*, Godb. 185; sub nom. *Crogate* v. *Morris*, 2 *Brownl.* 55, 146; 11 Digest (Repl.) 52, *757*.

C *Procter* v. *Mallorie* (1616), 1 Roll. Rep. 365; 81 E.R. 537; 11 Digest (Repl.) 43, *592*.

Hassard v. *Cantrell* (1695), 1 Lut. 101; 125 E.R. 53; 11 Digest (Repl.) 50, *721*.

Action of trespass for breaking, entering and digging up the plaintiff's close and filling up and spoiling the coney-burrows there.

There was a second count for doing the like in the plaintiff's free warren. The
D defendant pleaded justification under a right of common. He pleaded that the coney-burrows were wrongfully, unlawfully and injuriously newly erected and kept up, by reason whereof the common was surcharged and spoiled so that he could not enjoy sufficient common as of right he ought. He, therefore, justified the breaking, entering and digging up the plaintiff's close and filling up and spoiling the coney-burrows as it was lawful for him to do in order to abate the nuisance.
E

Morton for the plaintiff.

Aston for the defendant.

LORD MANSFIELD, C.J.—Whether it be or be not hurtful or how far it may be so is not the question. The question turns on the remedy; whether it is abatable, whether the commoner can do himself justice. It may be prejudicial
F to the commoner, yet not injurious; it may be both prejudicial and injurious, yet not abatable. The lord, by his grant of common, gives everything incident to the enjoyment of it (as ingress, egress, etc.), and thereby authorises the commoner to remove every obstruction to his cattle's grazing the grass which grows on such a spot of ground because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate or a wall to keep the commoner's cattle out is
G inconsistent with a grant which gives them a right to come in. But the lord still remains owner of the soil, and is not debarred from exercising any act of ownership. The commoner has no right to meddle with the soil. The true distinction is taken in *Mason* v. *Cæsar* (1), where the court was of opinion

> "that the defendant, a commoner, might abate the hedges; for thereby he did
H not meddle with the soil, but only pulled down the erection."

The hedge stopped the commoner from entering and putting in his beasts. The grant gave him leave to enter and put in his beasts; therefore, it virtually authorised him to remove any obstruction directly repugnant to that liberty.

But in the present case, the lord has done nothing contrary to the grant; he has not obstructed the commoner from entering and putting in his cattle. The lord
I has a right to put conies on the common as appears from *Carrill* v. *Pack and Baker* (2). The conies themselves naturally make the burrows. So that they are incident to the right of putting on the conies. If the lord surcharges, the commoner is injured in his right of common, it is true; but what is the commoner's remedy? Not to abate: not to be his own judge in a complicated question which may admit of nicety to determine.

There is a certain line to be drawn. The lord has a right so far, but no further. Yet the commoner cannot destroy or drive off the conies; nor, consequently can he destroy the burrows which is, in effect, destroying the conies. This is founded

on reason, and on many authorities: see *Horsey* v. *Hagberton* (3); *Carrill* v. *Pack and Baker* (2). And its being a free warren makes no difference, so that the question is not whether this be an injury, but whether it is abatable. A

I think it so clear a case that I have no difficulty at all about it.

DENISON, J., declared the same thing: I see no difference between this case and the cases cited but merely in the expression, viz., that in this case it is treated as a nuisance which is not the expression in them. But this form of expression makes no difference. On this record it must be taken that the plaintiff was owner of the soil, and had a free warren; and that there is not sufficient common left (by the increase of the conies) for the use of the commoner. The question then is whether the commoner shall be entrusted to destroy the estate of the lord, in order to preserve his own small right of common. B C

1 Roll. Abr. 405, pl. 2, gives the reason why the commoner cannot kill the conies, but ought to bring his assize or action; viz., "because he cannot be his own judge." So, here, this justification would make him a judge in his own cause. No; let him take his proper remedy. This is plain reason, even if it was not supported by authorities: but the cases are also strong to prove it.

The only point of this case turns on these pleadings calling it a nuisance. But this will not make it a nuisance abatable by the defendant himself; nor can it alter the law. In *Horsey* v. *Hagberton* (3), it was adjudged D

> "that the commoner has no other interest than to take the common, by feeding his cattle there: and may not destroy the conies nor coney-burrows."

A coney-burrow is not, of its own nature, a nuisance; on the contrary, it is essential to a free warren. Therefore, the nuisance depends on the number of them and you can, at the utmost, only abate so much of the thing as is a nuisance. You cannot destroy the whole (which is the right here claimed) but only so much of the thing as makes it a nuisance. In *R.* v. *Pappineau* (4), Lord Raymond, C.J., expressly declares so. Suppose a man builds his house up so high as to be a nuisance to his neighbour by obstructing his lights or in any other respect arising from its excess; you cannot destroy the whole house, but only so much of it as by its excess above what is allowable constitutes the nuisance. E F

FOSTER, J., was of the same opinion: This justification is clearly bad. It is founded on a claim of right which cannot be maintained. It is admitted that a commoner cannot, in this case, destroy the conies. Consequently, he cannot destroy the burrows, for the effect is destroying the conies. If the lord has exceeded the bounds of his right, the law is to determine the quantum of such excess; and to the law the commoner must resort for his remedy if he is aggrieved. G

Judgment for plaintiff.

A

TWYNE'S CASE

[Court of Star Chamber (Lord Keeper Sir Thomas Egerton, Popham, C.J., Anderson, C.J., and other judges), Michaelmas Term, 1601]

[Reported 3 Co. Rep. 80 b; Moore, K.B. 638; 76 E.R. 809]

B *Fraudulent Conveyance—Setting aside—Alienation of whole of grantor's property —Continuance in possession of grantor of goods conveyed—Alienation after writ issued against grantor—Statement that conveyance made without fraudulent intent—Power of revocation.*

A., who was indebted to B. in £400 and to C. in £200, was sued in debt by C. Pending the writ he made a secret assignment of all his goods and chattels to B. in satisfaction of his debt, but he still continued in possession of them, sold some of the goods, and set his mark on others.

C

Held: this was a fraudulent gift within the statute 13 Eliz. 1, c. 5, because (i) the gift was general, without exception of A.'s apparel or anything of necessity; there was a trust between the parties, for A. continued in possession and used the goods as his own, and a gift made bona fide within the statute must be a gift without any trust either express or implied, the trust being the cover of fraud; the gift was made in secret pending the writ; and there was also a clause that the gift was made honestly and bona fide, such a clause always arousing suspicion; (ii) the assignment not being made bona fide, a good consideration was not sufficient to take the case out of the statute.

D

Per Curiam: A conveyance made with a power of revocation is fraudulent as against a bona fide purchaser for valuable consideration, though the power be future or to be exercised with the assent of another person.

E

Notes. The statutes of 13 Eliz. 1, c. 5 (Fraudulent Conveyances) (1571) and 27 Eliz. 1, c. 4 (Fraudulent Conveyances) (1584) have been repealed by s. 207, Sched. 7, of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 844, 895), and substantially replaced by s. 172 of that Act (ibid. at p. 785). Section 172 (3) contains the proviso as to conveyances made in good faith for valuable consideration or upon good consideration, etc. The statute 13 Eliz. 1, c. 5, only contained the expression "good consideration" but at that time "good consideration" and "valuable consideration" were used interchangeably.

F

Distinguished: *Manton* v. *Moore* (1796), 7 Term Rep. 67. Applied: *Cramphorne* v. —— (1827), 6 L.J.O.S.Ch. 91; *Graham* v. *Furber* (1854), 14 C.B. 410. Referred to: *Hutchins* v. *Player* (1663) O.Bridg. 272; *Freeman* v. *Barnes* (1670), 1 Vent. 55; *Teynham* v. *Mullins* (1674), 1 Mod. Rep. 119; *Unwin* v. *Grosvenor* (1739), West temp. Hard. 647; *Taylor* v. *Jones* (1743), 2 Atk. 600; *Brown* v. *Heathcote and Martin* (1746), 1 Atk. 160; *Bennet* v. *Musgrove* (1750), 2 Ves. Sen. 51; *Clavey* v. *How* (1750), 2 Ves. Sen. 19; *Ryall* v. *Rolle* (1749), ante p. 82; *Worseley* v. *Demattos and Slader* (1758), 1 Burr. 467; *Wilson* v. *Day* (1759), 2 Burr. 827; *Mace* v. *Cadell* (1774), 1 Cowp. 232; *Law* v. *Skinner* (1775), 2 Wm. Bl. 996; *Devon* v. *Watts* (1779), 1 Doug.K.B. 86; *Estwick* v. *Caillaud* (1793), 5 Term Rep. 420; *Holbird* v. *Anderson* (1793), 5 Term Rep. 235; *Kidd* v. *Rawlinson* (1800), 2 Bos. & P. 59; *Lady Arundell* v. *Phipps*, [1803–13] All E.R.Rep. 597; *Ex parte Williams* (1805), 11 Ves. 3; *Dawson* v. *Wood* (1810), 3 Taunt. 256; *Dutton* v. *Morrison* (1810), 17 Ves. 193; *Reed* v. *Blades* (1813), 5 Taunt. 212; *Dearle* v. *Hall*, [1824–34] All E.R.Rep. 28; *Ex parte Castle* (1842), 3 Mont.D. & De G. 117; *Ward* v. *Audland* (1847), 16 M. & W. 862; *Muttyloll Seal* v. *O'Dowda* (1848), 4 Moo. Ind. App. 382; *Kelson* v. *Kelson* (1853), 1 W.R. 143; *Stone* v. *Van Heythuysen*, *Barton* v. *Van Heythuysen* (1853), 18 Jur. 344. *Cook* v. *Walker* (1855), 3 W.R. 357; *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Stansfeld* v. *Cubitt* (1858), 2 De G. & J. 222; *Corlett* v. *Radcliffe* (1860), 14 Moo.P.C.C. 121; *Re Mortimer*, *Ex parte Pearson* (1873), 42 L.J.Bcy. 44; *Re Wilson*, *Ex parte Wilson* (1874), 29 L.T. 860; *Re Bamford*, *Ex parte Games* (1879), 12 Ch.D. 314; *McBain* v. *Wallace* (1881),

G

H

I

6 App. Cas. 588; *Cookson* v. *Swire* (1884), 9 App. Cas. 653; *Re Sinclair, Ex parte Chaplin* (1884), 26 Ch.D. 319; *Re Telescriptor Syndicate*, [1903] 2 Ch. 174; *Murgatroyd* v. *Wright, Bannister, Claimant* (1907), 76 L.J.K.B. 747; *Glegg* v. *Bromley* (1911), 81 L.J.K.B. 334 (see [1911–13] All E.R.Rep. 1138).

As to conveyances impeachable by creditors and the protection of bona fide grantees, see 17 Halsbury's Laws (3rd Edn.) 654 et seq.; and for cases see 25 Digest (Repl.) 185 et seq.

Cases referred to:

(1) *Standen* v. *Bullock* (1600), cited in 3 Co. Rep. at p. 82 b; Moore, K.B. 605; 76 E.R. 817; 25 Digest (Repl.) 271, *798*.

(2) *Nedham* v. *Beaumont* (1590), cited in 3 Co. Rep. at p. 83 b; 76 E.R. 823; 25 Digest (Repl.) 262, *695*.

Information by Sir Edward Coke, the Queen's Attorney-General, against Twyne of Hampshire, in the Star Chamber, for making and publishing a fraudulent gift of goods. The question for the court was whether or not the gift was fraudulent and of no effect by the Statute 13 Eliz. 1, c. 5.

Pierce was indebted to Twyne in £400, and was indebted also to C. in £200. C. brought an action of debt against Pierce, and pending the writ, Pierce being possessed of goods and chattels of the value of £300, in secret made a general deed of all his goods and chattels real and personal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that, Pierce continued in possession of the goods, and some of them he sold; and he shore the sheep, and marked them with his own mark. Afterwards C. had judgment against Pierce, and had a fieri facias directed to the Sheriff of Southampton, who by force of the writ came to make execution of the goods; but divers persons, by the command of Twyne, with force resisted the sheriff, claiming them to be the goods of Twyne by force of the gift; and they openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration.

LORD KEEPER SIR THOMAS EGERTON, POPHAM and **ANDERSON, C.JJ.**, and the whole court of Star Chamber, resolved that this gift was fraudulent within 13 Eliz. 1, c. 5.

Sir Edward Coke, in his report, said that divers points were resolved: First, that this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or anything of necessity; for it is commonly said, quod dolus versatur in generalibus. Secondly, the donor continued in possession, and used the goods as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them. Thirdly, it was made in secret, et dona clandestina sunt semper suspiciosa. Fourthly, it was made pending the writ. Fifthly, here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud. Sixthly, the deed contains a clause that the gift was made honestly, truly, and bona fide; et clausulæ inconsuet' semper inducunt suspicionem.

Further, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of 13 Eliz. 1, c. 5, by which it is provided that the Act shall not extend to any estate or interest in lands, etc., goods or chattels made on a good consideration and bona fide; for although it is on a true and good consideration, yet it is not bona fide, for no gift shall be deemed to be bona fide, within the proviso which is accompanied with any trust; as if a man be indebted to five several persons, in the several sums of £20, and has goods of the value of £20 and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able. This shall not be called bona fide

within the proviso, for the proviso says on a good consideration and bona fide; so a good consideration does not suffice, if it be not also bona fide. Therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also, first, let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud; secondly, let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt; thirdly, immediately after the gift take the possession of them, for continuance of the possession in the donor is a sign of trust.

Know reader, that the words of the proviso, on a "good consideration," and "bona fide," do not extend to every gift made bona fide; and, therefore, there are two manners of gifts on a good consideration, viz., consideration of nature or blood, and a valuable consideration. As to the first, in the case before put; if he who is indebted to five several persons, to each party in £20, in consideration of natural affection, gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, etc., which are things of value, the intent of the statute was, that the consideration in such case should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle. Therefore, it shall be intended, that it was made to defeat his creditors. And if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. As to gifts made bona fide, it is to be known that every gift made bona fide, either is on a trust between the parties or without any trust. Every gift made on a trust is out of this proviso; for that which is between the donor and donee, called a trust per nomen speciosum, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. Every trust is either expressed or implied. An express trust is when in the gift, or upon the gift, the trust by word or writing is expressed; a trust implied is when a man makes a gift without any consideration, or on a consideration of nature or blood only. So note, valuable consideration is a good consideration within this proviso; and a gift made bona fide is a gift made without any trust either expressed or implied. By which it appears, that as a gift made on a good consideration, if it be not also bona fide, is not within the proviso; so a gift made bona fide, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration and also bona fide.

In 1600 in the Common Pleas, on evidence to a jury, in *Standen* v. *Bullock* (1), these points were resolved by the whole court on the statute 27 Eliz. 1, c. 4. Walmsley, J., said that Sir Christopher Wray, C.J., reported to him that he and all his companions of the King's Bench were resolved, and so directed a jury on evidence before them, that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers others of his blood, with a future power of revocation, as after such feast, or after the death of such one. Afterwards, and before the power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs. This bargain and sale is within the remedy of the statute. For although the statute says: "The said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes in esse: yet it was held that the intent of the statute was that such voluntary conveyance which was originally subject to a power of revocation, be it in præsenti or in futuro, should not stand against a purchaser bona fide for a valuable consideration; and if other construction should be made, the statute would serve for little or no purpose, and it would be no difficult matter to evade it. So if A. had reserved to himself a power of revocation with the assent of B. and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy

of the statute; for otherwise the good provision of the statute, by a small addition and evil invention, would be defeated. A

Further, it was resolved that if a man has power of revocation, and afterwards, to the intent to defraud a purchaser, he levies a fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains and sells the land to another for a valuable consideration, the bargainee shall enjoy the land, for as to him, the fine, feoffment, or other conveyances, by B which the condition was extinct, was void by the statute; and so the first clause, by which all fraudulent and covinous conveyances are made void as to purchasers, extend to the last clause of the statute, viz. when he who makes the bargain and sale had power of revocation. It was said that the statute of 27 Eliz. 1, c. 4, has made voluntary estates made with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin to defraud purchasers. C

Further, it was resolved that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a purchaser for money or other valuable consideration, for although in the preamble it is said: "for money or other good consideration," and likewise in the body of the statute: "for money or other good consideration," yet these words "good consideration" are to be intended only of valuable consideration. That appears by the clause which concerns those who had D power of revocation, for there it is said, "for money or other good consideration paid, or given," and this word "paid" is to be referred to "money," and "given" is to be referred to "good consideration," so the sense is for money paid, or other good consideration given, which words exclude all considerations of nature or blood, or the like, and are to be intended only of valuable considerations which may be given. Therefore, he who makes a purchase of land for a valuable consideration E is only a purchaser within this statute. This latter clause well expounds the words "other good consideration" mentioned before in the preamble and body of the statute.

And a case referred out of the Chancery in *Nedham* v. *Beaumont* (2), on conference had with the other justices, it was resolved that although the issue was a purchaser, yet he was not a purchaser in vulgar and common intendment: also F consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the statute 27 Eliz. 1, c. 4, a valuable consideration is only a good consideration within that statute. In the present case Anderson, C.J., of the Common Pleas, said, that a man who was of small understanding, and not able to govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to G them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same. Afterwards, he being seduced by deceitful and covinous persons, for a small sum of money bargained and sold his land, being of a great value. This bargain, although it was for money, was held to be out of this statute, for this statute is made against all fraud and deceit, and does not help any purchaser who does not come to the land H for a good consideration lawfully and without fraud or deceit; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration bona fide, without deceit or cunning.

By the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

WYCHERLEY *v.* WYCHERLEY

[Lord Chancellor's Court (Lord Henley, L.C.), February 4, 7, 18, 1763]

[Reported 2 Eden, 175; 28 E.R. 864]

Family Arrangement—Transaction regarded with favour by court—Value of consideration not weighed—Ease, comfort, and security of family—Protection from paternal influence.

The court will attend to slight considerations for confirming family settlements. They pay regard to reasonable motives and honourable intentions. They will not weigh the value of the consideration. They consider the ease and comfort and security of families as a sufficient consideration. But where a father unduly compels a child by paternal influence the court ought to be rigid in guarding against it.

A son upon his marriage joined with his father in suffering a recovery by which the estate was re-settled on the father for life, remainder to the son in fee, and the son by a memorandum executed at the same time agreed to execute a deed within one month to secure £500 to each of his two sisters, payable within six months after the death of his father,

Held: there was sufficient consideration for the court to decree specific performance of this agreement, an attempt to show that it had been obtained by an undue exercise of parental authority having failed since it was proved that the father had gained no advantage from the limitations.

Notes. Referred to: *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Bentley* v. *Mackay* (1862), 31 Beav. 143; *Hoblyn* v. *Hoblyn* (1889), 41 Ch.D. 200.

As to validity and effect of family arrangements, see 17 Halsbury's Laws (3rd Edn.) 223 et seq.; and for cases see 24 Digest (Repl.) 1122 et seq.

Case referred to:

(1) *Carpenter* v. *Heriot* (1759), 1 Eden, 338; 2 Keny. 533; 28 E.R. 715; 12 Digest (Repl.) 113, *665*.

Bill by the two plaintiffs praying specific performance of an agreement charging an estate with the payment to them of £500 each, and **Cross-bill** seeking to have that agreement cancelled as having been obtained under undue influence.

Daniel Wycherley being seised of lands in the county of Salop, by indentures of lease and release, bearing date Sept. 9 and 10, 1696, conveyed to trustees, to the use of himself for life, remainder to his sons in strict settlement, remainder to Thomas Wycherley, of Latham, for life, remainder to trustees, to preserve contingent remainders, remainder to his first and other sons in tail male; remainder to his own right heirs.

In 1757 the premises became vested under the above settlement in Thomas Wycherley, the grandson of the above named Thomas Wycherley of Latham. It appeared that he had been before that time living in great indigence and obscurity. His family consisted of Daniel, the defendant, and two daughters, the plaintiffs. Daniel Wycherley, the son, being desirous to make a settlement upon his approaching marriage, an arrangement was proposed with his father to re-settle the estate. His father at first wished that he would settle part of the premises upon his mother, and make a provision for his sisters. The son, however, refused the former proposal, but acquiesced in the latter. An agreement was entered into, that if Thomas, the father, would suffer a recovery, and declare the uses to himself for life, remainder to the defendant Daniel in fee, he, the said defendant, Daniel, would secure £500 each to the plaintiffs, his sisters, payable within six months after the decease of the said Thomas Wycherley. The recovery was accordingly suffered to the above uses in Trinity Term, 1757.

By a memorandum, bearing date July 13, 1758, the defendant Daniel Wycherley, in consideration of natural love and affection to his sisters, agreed within one

month from the date thereof, to execute a deed to secure £500 each to his sisters, payable within six months after the death of his father.

The bill in the first cause, which was brought by the sisters, prayed a specific performance of the agreement contained in the memorandum, and that the estate might be charged with £500 each for their benefit. The cross-bill was filed by the son, and prayed that the memorandum might be cancelled, as having been obtained under undue influence, and parental authority, and as being voluntary and without consideration. It appeared that Henshaw, the father-in-law of the defendant, had, previous to his marriage, insisted upon a settlement, and upon an immediate provision to be allowed by Wycherley, the father; that the father was unable to make any such allowance, and that Henshaw, in consequence, strongly urged the son not to enter into any agreement to re-settle the premises. The son, however, afterwards executed the agreement, and though evidence was entered into of strong language used by the father, yet no case of improper exertion of authority was made out by the evidence.

Sewell and *Perryn* for the plaintiffs.
The Attorney-General, de Grey, and *Comyn* for the defendant.

LORD HENLEY, L.C.—Upon the best consideration I have been able to give this matter, I think I ought to dismiss the cross-bill, and to pronounce a proper decree for a specific performance of the agreement, signed by Mr. Wycherley.

The questions made by his counsel are two: (i) They object want of consideration; (ii) they make what would have been a still stronger objection if substantiated in proof, viz., that the agreement was obtained by undue means, and under an improper exertion of paternal influence. If either of these objections had been made out in evidence, I should not have decreed as I am going to do, as the case stands.

I do not lay it down as a universal rule that the court will in no case execute a voluntary conveyance, though I do not recollect a precedent of that sort. It is certain that, in general, courts will not compel the performance of voluntary agreements. An agreement, in its nature, imports a reciprocity, and a quid pro quo, and where that reciprocity does not exist, the power of enforcing it does not exist. (I do not mean cases of specialties, where the deed itself is evidence of a consideration.) I say, I know no instance where a court of equity has compelled a man to execute what was a mere act of volition. But I think the present was not a mere voluntary agreement, and the court will (and I am warranted by the precedents to say, that it has done so) attend to slight considerations for confirming family settlements and modifications of property. They pay regard to reasonable motives and honourable intentions. In these cases they will not weigh the value of the consideration. They consider the ease and comfort and security of families as a sufficient consideration. In the case of collateral limitations, purchased by a father on the marriage of his son, by relinquishment of part of his estate, this court will make the father a purchaser of such collateral limitations.

Consider the state of the family when the agreement was made. By a settlement in 1696, the father was tenant for life, remainder to his first and other sons, reversion in fee to the right heirs of the settlor. The jointress dying in 1757, the remainder then vested as a fruitful remainder to the father, then an old man, and probably before both obscure and indigent. It was very material for him, and it was his duty to make all the use he could of the estate, to make a provision for his daughters. The son was at that time paying his addresses to a young lady who had no fortune till a settlement was made: that was a proper opportunity for the father to come to terms with his son, as the son, without the father's concurrence, could not have made a jointure, or any provision for younger children. The father, therefore, proposed that if the son would make a settlement on the daughters, he would join with him in opening the estate, and upon this a treaty was entered into; and what was done then is conclusive

upon the point of parental influence, because the son absolutely refused to do anything to let in his mother. The witnesses say he negatived this absolutely, but as to his sisters, he was very ready to make a provision for them. He thought it very proper; he had no objection. These, or the like expressions, are used by some or one of the witnesses. And, in truth, it would have been very unnatural, and a want of piety to his father, and affection to his sisters, if he had refused in joining to make a provision for the sisters out of the estate. His objection was to the projected provision for his mother, and not to that for his sisters.

The family he was going to marry into wanted, indeed, a reasonable provision to be made for the immediate sustenance of himself and his family, and this was very prudent; and there was nothing improper in their endeavouring to do it. The father, however, thought that he could not afford it, and it was in consequence refused. The son thereupon rejects the advice given him by his intended father-in-law, Mr. Henshaw, and executes this writing seven days before the execution of the deeds, making a tenant to the præcipe: one of the witnesses proves the manner in which it was executed. Soon afterwards the son tells Mr. Henshaw he would not blame him if he knew his motives. These motives are not well explained to him. I consider the motive was the father joining with him in suffering the recovery. When the deed was brought to Mr. Henshaw he never objected to the general import, but only to its form. He did not say it was a voluntary and improper agreement, but found fault with the word "grant," as containing a warranty. The son himself did not object to any other part. The whole family took it as a charge; what else could be the reason of leaving part of the estate unsettled, when the son had, besides that, a power to raise a limited sum for payment of his debts?

I shall always hold the opinion I did in *Carpenter* v. *Heriot* (1), because I took it from the dicta of the greatest judges that ever sat in this court, from LORD NOTTINGHAM down to the present time, that wherever a father purchases an office, or anything else for his son, it shall always be considered as an advancement, and not as a loan. To make any other construction would be repugnant to every principle of law, for if I could charge my son with his schooling, his education at the university, and the expenses of travelling, etc., it would be to say the son might contract debts with his father at a time when he could contract with no other person. In cases, therefore, where a father unduly compels a child by paternal influence, the court ought to be strictly rigid in guarding against it. But here I see nothing which the father might not properly do (though more properly, to be sure, if he had done it with less warmth of temper), for what reason could there be for the father to come in and give the son a marketable interest, and the son do nothing for himself or the family? It was said that nothing was intended but to vest the remainder in fee in this family. I thought in the opening that such had been the case; if so, and the remainder in fee had been limited to the father, I should have thought it a case of parental influence. But here the father has only an estate for life, with a remainder in fee to the son.

BARLOW *v.* BATEMAN

[ROLLS COURT (Sir Joseph Jekyll, M.R.), July 13, 1730]

[Reported 3 P.Wms. 64; 24 E.R. 971]

[HOUSE OF LORDS, April 2, 1735]

[Reported 2 Bro. Parl. Cas. 272; 1 E.R. 939]

Will—Condition—Condition precedent—Legacy on condition that A. married person named B—Name of B. assumed before marriage—Right of A. to legacy.

Will—Name and arms clause—Gift on condition that legatee married person named B.—Surname of B. assumed by husband of legatee before marriage.

A. gave a legacy to his daughter on condition that she married a man of the name of B. The daughter married a person who three weeks before the marriage had assumed the name of B.,

Held by the House of Lords, reversing the decision of SIR JOSEPH JEKYLL, M.R.: this was not a performance of the condition so as to entitle the daughter and her husband to the legacy.

Notes. Considered: *Wakefield* v. *Wakefield* (1807), 1 Hag. Con. 394; *Leigh* v. *Leigh* (1808), 15 Ves. 92. Referred to: *Pyot* v. *Pyot* (1749), 1 Ves. Sen. 335; *Re Berens*, *Re Dowdeswell*, *Berens-Dowdeswell* v. *Holland-Martin*, [1926] Ch. 596.

As to partial restraint of marriage, see 39 HALSBURY'S LAWS (3rd Edn.) 919; and for cases see 48 DIGEST (Repl.) 333 et seq. As to change of name, see 34 HALSBURY'S LAWS (3rd Edn.) 509; and for cases see 35 DIGEST (Repl.) 786 et seq.

Appeal from a decision in the Rolls Court in an action under a will.

Mr. Barlow, of Wales, gave a legacy of £1,000 to his daughter on condition that she married a man who bore the name and arms of Barlow, and if the daughter married one who should not bear the name and arms of Barlow, then the testator bequeathed the £1,000 to the plaintiff. The daughter married the defendant, whose name was Bateman; but about three weeks before the marriage he called himself Barlow; and it was said that it was usual to have an Act of Parliament to take a new name, which had not been done in this case. Besides, it was the intention of the testator that the person who should marry his daughter, and be entitled to this additional legacy, should be one of his family, and have originally borne that name; whereas the defendant was of a family much inferior, and would, in all probability, as soon as he should have received the legacy, take again his true name of Bateman, wherefore the plaintiff claimed the £1,000.

SIR JOSEPH JEKYLL, M.R.—The plaintiff claims this legacy as a devise over on a supposition that the daughter has forfeited it, but I am of opinion that the condition is complied with, by the defendant's taking the name of Barlow. Surnames are not of very great antiquity, for in ancient times the appellations of persons were by their Christian names and the places of their habitation; as Thomas of Dale, the place where he lived. I am satisfied the usage of passing Acts of Parliament for the taking upon one a surname is but modern, and that anyone may take upon himself what surname and as many surnames as he pleases without an Act of Parliament.

Although the plaintiff's counsel desired the court would direct that the defendant should ever after retain the surname of Barlow, from an apprehension that he would, when he should have received the legacy, resume his old name of Bateman, yet HIS HONOUR refused to make any such decree.

On appeal to the House of Lords HIS HONOUR'S decree was reversed, the court holding that the plaintiff was entitled to the legacy of £1,000.

A

R. v. VAUGHAN

[Court of King's Bench (Lord Mansfield, C.J., Yates, Aston and Willes, JJ.), November 17, 27, 1769]

[Reported 4 Burr. 2494; 98 E.R. 308]

B *Criminal Law—Bribery—Bribery of public officer—Privy Councillor—Attempt to bribe—Misdemeanour at common law.*

A person who attempts to bribe a Privy Councillor to procure an office is guilty of a misdemeanour at common law.

Constitutional Law—Colony—Application of English law.

C A country obtained by conquest retains its own laws until the conqueror thinks fit to change them. Every colony by necessity carries with it at its first plantation the laws of England, except those laws which are not suited to the circumstances of the new colony. No Act of Parliament made after a colony is planted is construed to extend to it without express words showing the intention of the legislature to be that it should so extend.

D

Notes. Followed: *R.* v. *Pollman* (1809), 2 Camp. 229. Considered: *R.* v. *Whitaker*, [1914] 3 K.B. 1283. Referred to: *R.* v. *Scofield* (1784), Cald. Mag. Cas. 397; *R.* v. *Higgins* (1801), 2 East, 5; *R.* v. *Philipps* (1805), 6 East, 464; *R.* v. *Brailsford*, [1904–7] All E.R.Rep. 240; *R.* v. *Manley*, [1933] 1 K.B. 529; *R.* v. *Young* (1944), 30 Cr. App. Rep. 57.

E As to bribery of public officers, see 10 Halsbury's Laws (3rd Edn.) 616; and for cases see 15 Digest (Repl.) 807. As to application of English law to conquered and ceded territories, see 5 Halsbury's Laws (3rd Edn.) 693 et seq.; and for cases see 8 Digest (Repl.) 766 et seq.

Case referred to:

F (1) *R.* v. *Plympton* (1724), 2 Ld. Raym. 1377; 92 E.R. 397; 20 Digest (Repl.) 194, *1705*.

Motion for an Information for a misdemeanour for attempting to bribe a Privy Councillor to procure an office.

On Nov. 17, 1769, Dunning, the Solicitor-General, moved for an information for a misdemeanour, at the private prosecution of the Duke of Grafton, then first G Lord of the Treasury. He produced an affidavit of the Duke of Grafton's, proving a letter to be received by him from the defendant containing an offer to pay £5,000 into the hands of Mr. Henry Newcombe, to be delivered by him to the person who should procure a patent of the reversion of the office of Clerk of the Supreme Court of the Island of Jamaica for the lives of Mr. Vaughan's three sons or the lives of three other persons to be named by him. He had likewise affidavits to authenti- H cate the handwriting of Mr. Vaughan. Mr. Vaughan sent a case also to the duke, desiring his perusal of it at his leisure, which related to the nature of this office. It was accompanied by a letter to his Grace, enclosing an affidavit, which affidavit Mr. Vaughan says, "will show the proposal; which will be increased if necessary." The letter offers to "leave security in Mr. Henry Newcombe's hands, to answer I paying the £5,000 to the order of the person who should procure the said patent." It concludes:

> "I will take an opportunity of waiting upon your Grace; hoping the honour of a conference; otherwise, to receive back this affidavit, in order to destroy the same."

The affidavit enclosed in this letter was made before the Lord Mayor of London. It represented this to be a matter that required the utmost secrecy; and it is thereby sworn (besides what is above mentioned)

"that this whole affair is an entire secret to everyone but Mr. Henry Newcombe; and that, whether his present proposal shall prove efficacious, or be rejected, he never will disclose it to any person whatsoever." A

The court had asked the Solicitor-General upon his first moving this matter, in whose disposition this office was; and wished that there might be an affidavit to that purpose. Accordingly, an affidavit of one Mr. Pollock was now produced and read: B

"That the office was in the disposition of the King, and passed by a grant under the Great Seal, which took its rise from a sign manual counter-signed by one of the Secretaries of State."

There was likewise another affidavit now read, of one Mr. Reynell: C

"That the supreme court of Jamaica is like the three courts of King's Bench, Common Pleas, and Exchequer, in England: besides which, they have also a Court of Chancery."

Wedderburn and *Lee* for the defendant, showed cause against granting an information.

Dunning, *Wallace*, and *Ranby* for the prosecutor. D

LORD MANSFIELD, C.J.—The defendant himself thought this transaction would not bear the light. His affidavit says that it was a matter that required the utmost secrecy. The extraordinary security for the money which he proposed to leave in Mr. Newcombe's hands, the affidavit offering to pay it, and swearing to keep it a profound secret, and the other circumstances all prove that he himself E looked upon it as an unjustifiable transaction. If these transactions are believed to be frequent, it is time to put a stop to them. A Minister trusted by the King to recommend fit persons to offices would betray that trust and disappoint that confidence if he should secretly take a bribe for that recommendation. A terrible consequence would result to the public, if everything that such an officer is concerned in advising the disposal of, should be set up to sale. I am, therefore, for F making the rule absolute. He may demur, or move in arrest of judgment, or appeal to a higher judicature. I am clear that this is a misdemeanour, and punishable as such. But nevertheless I shall be open to hear arguments on a demurrer or in arrest of judgment without prejudice.

As to the statutes of 12 Rich. 2, c. 2 [Corrupt appointments to offices (1388): repealed by Promissory Oaths, 1871 (c. 48)], and the Sale of Offices Act, 1551, I agree G with the Solicitor-General, "that the argument does not turn upon their extending or not extending to Jamaica," for this office is granted under the Great Seal. The argument is strong that these statutes do not extend to Jamaica; although they were enacted long before that island belonged to the Crown of England.

If Jamaica was considered as a conquest, they would retain their old laws until the conqueror had thought fit to alter them. If it is considered as a colony, which H it ought to be, the old inhabitants having left the island, then these statutes are positive regulations of police, not adapted to the circumstances of a new colony, and, therefore, no part of that law of England which every colony, from necessity, is supposed to carry with it at its first plantation. No Act of Parliament made after a colony is planted is construed to extend to it without express words showing the intention of the legislature to be that it should. But here, the office is granted I by letters patent under the Great Seal of England, and, therefore, must be governed by the laws of England.

So that it turns upon the common law. The first consideration is whether a great officer, at the head of the Treasury, and in the King's confidence, selling his interest with the King, in procuring an office, is not guilty of a crime. The King is not to raise a revenue out of this office. The duke swears, and it is not denied, that the £5,000 was offered to him to procure this office for Mr. Vaughan. Can it be doubted whether the doing this would have been criminal in the Duke

of Grafton? I suppose that most of the impeachments against ministers have been for taking money to procure offices grantable by the Crown. Wherever it is a crime to take, it is a crime to give. They are reciprocal. In many cases, especially in bribery at elections to Parliament, the attempt is a crime: it is complete on his side who offers it. If a party offers a bribe to a judge, meaning to corrupt him in a case depending before him and the judge does not take it; yet this is an offence punishable by law, in the party that offers it: 3 Inst. 147. So also a promise of money to a corporator to vote for a mayor of a corporation; as in *R.* v. *Plympton* (1). So also must be an offer to bribe a Privy Councillor to advise the King. Therefore, it appears to me that this is a misdemeanour. But if it be in the least doubtful, I would have it put in such a way that a judgment may be solemnly had upon it.

YATES, J.—This has not the least resemblance to the sale of an office. This charge is for attempting improperly the procuring of the office; not for giving a price for bestowing it. It is an office in the gift of the Crown; not of the duke himself. The affidavit which mentions "that the matter requires the utmost secrecy," shows the defendant's own sentiments about it: and he desires, in case of non-acceptance of his offer, to have the affidavit back again, in order to destroy it. This does not agree with the excuse about a trap. No doubt, this is an offence at common law. If it be but questionable, it ought to be inquired into: it is a matter fit for inquiry. It may hereafter be more solemnly determined on demurrer or in arrest of judgment, or otherwise.

ASTON and **WILLES, JJ.**, concurred. *Rule absolute.*

BOYCOT AND OTHERS *v.* COTTON AND OTHERS

[Lord Chancellor's Court (Lord Hardwicke, L.C.), November 24, 1738]

[Reported West temp, Hard. 520; 1 Atk. 552; 25 E.R. 1064]

Portions—Death of portioner before portion payable—Portion sinking into estate.

Whether a portion charged on land be given with or without interest, by deed or by will, if the portioner dies before the age at which it becomes payable, the portion ought not to be raised, but ought to sink into the estate for the benefit of the heir.

Portions—Interest—Power to charge estate—Payment of interest annually—Avoidance of accumulation.

Where there is a power to charge an estate with a gross sum for portions a power to charge it with interest also is implied because it may be necessary that interest should be given by way of maintenance. But the court is careful that real estate in the hands of the heir shall not be overburdened.

Per Lord Hardwicke, L.C.: The court has been so liberal in their construction that they have charged land with interest even before the portion has vested.

Interest should be paid annually and not allowed to accumulate.

Portions—Vesting—On death of portioner limitation over to another—No mention of age for payment—Death of portioner before time of payment—Immediate vesting in second person.

Where a portion is given, payable at a certain age, to one person, and, if that person dies, is limited over to another without mentioning any age at which

it should be paid, if the first person dies before the time of payment, it vests in the second immediately.

Notes. Considered: *Henty* v. *Wrey* (1882), 21 Ch.D. 332; *Balfour* v. *Hodgson* (1883), 23 Ch.D. 472. Referred to: *Parker* v. *Hodgson* (1801), 1 Drew. & Sm. 568.

As to portions, see 34 HALSBURY'S LAWS (3rd Edn.) 496–503. For cases see 40 DIGEST (Repl.) 648 et seq.

Cases referred to:

(1) *Lady Cave* v. *Cave* (1705), 2 Vern. 508; 23 E.R. 925; 49 Digest (Repl.) 1049, *9820.*

(2) *Brewin* v. *Brewin* (1702), Prec. Ch. 195; Freem. Ch. 254; 24 E.R. 94; sub nom. *Bruen* v. *Bruen*, 2 Vern. 439; 40 Digest (Repl.) 682, *1769.*

(3) *Tournay* v. *Tournay* (1709), Prec. Ch. 200; 2 Eq. Cas. Abr. 654, pl. 6; 24 E.R. 139, L.C.; 40 Digest (Repl.) 679, *1747.*

(4) *Jackson* v. *Farrand* (1701), 2 Vern. 424; 1 Eq. Cas. Abr. 268; 16 Vin. Abr. 448; 23 E.R. 871; 40 Digest (Repl.) 675, *1715.*

Bill praying for an order that portions provided for children might be raised and paid in pursuance of a deed of 1701.

By an indenture dated July 27, 1687, Sir Robert Cotton and Dame Hester, his wife, covenanted to levy a fine to trustees and their heirs of the capital messuage of Lewenez and lands thereunto belonging, and of several estates in Denbighshire therein mentioned, to the use of Sir Robert and Dame Hester for their lives, and the life of the survivor, without impeachment of waste, remainder to Thomas Cotton, their second son, remainder to trustees to preserve contingent remainders, to the first and other sons of Thomas in tail male, and after divers remainders to the use of Dame Hester and her heirs, with a proviso that it should be lawful for Thomas Cotton, or any other tenant in tail in possession, after the death of Sir Robert and Hester, by any deed or will executed by them in the presence of three or more witnesses to limit any part of the same lands, not exceeding £500 a year, to a wife for life for her jointure, and a power also for Thomas Cotton and the other tenants in tail in possession to charge any part of the lands, not exceeding £500 a year, for portions for his younger children, subject to a power of revocation in Sir Robert and Dame Hester and the survivor of them by deed or will. In or about 1690 Thomas Cotton, the eldest son of Sir Robert, married Philadelphia Linch, and by indentures of lease and release in 1701 Sir Robert covenanted that Hester should levy a fine of the premises therein mentioned to the use of Thomas Cotton (afterward Sir Thomas) for life, with power to commit waste, remainder to trustees to preserve contingent remainders, remainder to Philadelphia for her jointure, remainder to trustees for 500 years, without impeachment of waste, remainder to Sir Robert Cotton in fee.

The term of 500 years was in trust, that, if Thomas should die leaving any daughter or daughters or younger child or children by Philadelphia living at his death it should be lawful for the trustees or the survivor or the executors of the survivor by rents and profits, or by demise, mortgage, or sale of the term, or by selling timber, or by any means they should think fit, or most for the advantage of such younger children to raise such sums of money for the portions or yearly maintenance of such children, namely, if there should be a son, and but one younger child, £3,000, and if two or more younger children then £5,000 to be equally divided, to be paid to the daughters at 18 or marriage, which should first happen, and to the sons at 21, and, until such portions should be payable, should pay to such younger child, if but one, £60 a year, and, if more, £50 apiece, at Lady Day and Michaelmas, provided that, if any daughter or daughters should have attained 18 or be married in the lifetime of Thomas Cotton, and their portions unpaid, or if any son would attain 21, in Thomas Cotton's lifetime and their portions unpaid, then the portion of such child or children should be paid to them in twelve months after the death of Thomas Cotton, or as soon afterwards as might be,

A and in the meantime, the said £60 and £50 yearly, or the interest of their portions for a maintenance.

Dame Hester died in 1709, and Sir Robert Cotton in December, 1712, without revoking or altering the uses of the deed of July, 1687, leaving several children, particularly Thomas Cotton, his eldest son, who entered upon the estates limited in use to him by the deed of 1687, and had twelve children by Philadelphia. Being B minded to increase her jointure, he executed a deed poll dated July 31, 1714, whereby he limited the capital messuage, with the lands and appurtenances in Lewenez, and several other lands in Denbighshire, to which the power extended, and which were then under the yearly value of £500 to the use of Philadelphia and her assigns, after his decease for life, as a further increase of her jointure. As a further provision for his younger children, he executed another deed poll, dated C Aug. 1, 1714, reciting the deed of 1687 and that of 1714, and that he, in pursuance of the power given him for raising portions for younger children, charged the residue of the messuages, lands and premises comprised in the indenture of 1687, and not limited by the said deed poll to his wife, and after her decease charged the several premises and appurtenances therein mentioned with the sum of £675 for the portion of his son Stephen, £675 for John Salisbury Cotton, £675 for Lynch; £675 D for the plaintiff, Philadelphia Boycot, £675 for the plaintiff Sophia, £675 for the plaintiff Hester Maria, £675 for Sidney Arabella, and £675 for Vere, such portions to be paid to such children as should have attained 21 before his death within one year after his death, and to such child as should be under 21 at his death, to be paid to his sons at 21 and to his daughters at 21, or marriage, which should first happen, the respective portions to be paid with interest at 5 per cent. per annum E from his death to the payment thereof.

Sir Thomas Cotton died on June 12, 1715, and appointed Dame Philadelphia sole executrix of his will. He left nine children, Robert, then Sir Robert, Stephen, John, Lynch, the plaintiffs, and Vere. In 1716, Dame Philadelphia married Thomas King, since deceased. By the death of Sir Thomas Cotton, the plaintiffs and also John Salisbury Cotton became entitled to their shares of the £5,000 with interest F from the age of 18, and to the sum of £675 apiece, limited to them by the deed of Aug. 1, 1714, with interest from the death of Sir Thomas. Philadelphia had two children by Mr. King, Thomas and Cotton King. In 1727 Stephen Cotton died, having made his will and appointed Sir Robert Salisbury Cotton, his brother, sole executor and residuary legatee. On Mar. 21, 1728, John Salisbury Cotton being above 26, died intestate and unmarried, having received very little, if any, G of the said sums, and administration was granted to Dame Philadelphia, his mother. In or about September, 1730, Vere Cotton died intestate and unmarried at the age of 16, having received very little, if any, of the shares due to her of the said several sums, and administration was granted to Philadelphia, her mother.

Dame Philadelphia, Thomas King the elder, Lynch Cotton, and the plaintiffs came to an agreement dated Oct. 21, 1734, whereby Thomas King and Dame Phila- H delphia, in consideration that the plaintiffs had agreed to release all their claim on account of the personal estate of Sir Thomas Cotton and the rents of the Denbighshire estate received by Dame Philadelphia after her marriage, agreed to convey to the plaintiffs all their right and interest in the personal estate of John Salisbury Cotton and Vere Cotton. Thomas King, the elder, died in or about January, 1735, having bequeathed his personal estate to Dame Philadelphia, and I appointed her sole executrix. In pursuance of the agreement above-mentioned, by a deed, dated Mar. 28, 1735, Philadelphia assigned to the plaintiffs all her parts and proportions of the personal estates of John Salisbury Cotton and Vere Cotton which were vested in her, to hold to the plaintiffs as their estates in equal shares, and appointed them her attorneys to receive the same.

The plaintiffs, having attained the age of 18, brought their bill against Sir Robert Salisbury Cotton and the trustees, praying that their portions might be raised and paid in pursuance of the deed in 1701 and also the £675 apiece charged on the estate in Denbighshire, with interest from the death of Sir Thomas Cotton, and

also for the plaintiff's shares of the estate of John Salisbury Cotton, with interest from his age of 21, and also for their shares of the estate of Vere Cotton.

LORD HARDWICKE, L.C.—It is admitted in the cause that the whole of the lands charged did not amount to above £500 per annum, that Vere Cotton, one of the daughters of Sir Thomas Cotton, died at the age of 16, and that John Salisbury Cotton, one of the sons, died at or about the age of 27. The first question is whether Sir Thomas Cotton could charge interest. The second question is whether he has so charged it that it may be annually received, or whether it must be accumulated and paid by way of principal sum at the age of 21. The third question is whether the sum of £675 was transmissible at the death of Vere Cotton at 16, or sinks into the real estate for the benefit of the reversioner.

As to the first question, I am of opinion that Sir Thomas Cotton could charge the estate with interest, for where there is a power to charge an estate with a gross sum it likewise implies a power to charge it with interest because it may be necessary that interest should be given by way of maintenance, for there may be no other. This court has been so liberal in their construction that they have charged land with interest even before the portion has vested. It was objected by the counsel for the defendant Sir Robert Salisbury Cotton that this is a power to charge an estate in reversion only, and it has been truly said that this court has been very careful that real estate in the hands of the heir shall not be overburdened. But the rule does not prevail in the present case because it appears by the settlement in 1687 that regard was paid to the preservation of the estate for the reversioner, the intention being chiefly to make a large provision for younger children, and Sir Thomas Cotton has subsequently charged the whole value of the estate for portions. If Sir Thomas could, therefore, exhaust the whole estate by charging of principal sums, then where is the difference if he exhausts it by charging partly interest and partly principal or by principal only.

As to the second question, I am of opinion that the interest ought not to accumulate, but to be paid annually, for when it is given at the rate of 5 per cent. the natural construction is that it should be paid annually, and becomes due every day, for it is given as a recompense in the meantime until the principal is due.

As to the third question, I am of opinion that Vere Cotton's share of £675 ought not to be raised, but ought to sink for the benefit of the heir. It is settled now, whether the portion charged upon land be given with or without interest, by deed or by will, if the portioner dies before the age at which it becomes payable, it shall sink into the estate. *Lady Cave* v. *Cave* (1) has been much relied on by the counsel for the plaintiffs in support of their opinion that the principal ought to be raised notwithstanding the death of Vere Cotton at her age of sixteen. In that case MR. VERNON states (2 Vern. 508):

> "A. devised £4,000 to his son to be paid at his age of 25, and interest in the meantime, and he to have a maintenance, and directs the £4,000 to be raised out of a trust estate: the son dies under 25, held by LORD KEEPER WRIGHT to be a vested legacy, and that it went to his executors."

This case, as it is reported in the books, is an authority in point, but I have ordered the Register to be searched, and, as it is there stated, it is impossible it could be made a question in the cause. I am very sorry to find that the reports of so able a man should be so imperfect, and come out in this manner. Where a portion is given, payable at a certain age, to one person, and, if that person dies, is limited over to another without mentioning any age when it should be paid, if the first person dies before the time of payment, it vests in the second immediately, for it is as to him a new legacy.

Bruen v. *Bruen* (2), in 2 Vern. 439, goes a great way to overturn his own authority of *Cave* v. *Cave* (1), and as it is reported in Prec. Ch., 195, is exactly right.

> "The case was, a term created by a marriage settlement to raise £3,000 for daughters' portions, within two months after the death of the survivor of husband and wife: the daughter of the marriage dying at the age of five years,

A and the portion being to be raised out of land, it shall not be raised for her administrator, but the interest or maintenance the child was entitled to shall be raised."

This comes extremely near the present case. There is an authority too in LORD COWPER exactly in point, *Tournay* v. *Tournay* (3) (Prec. Ch. 290):

B "There, by marriage settlement, a term is created for raising £400 apiece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised; held by LORD COWPER, that it should sink in the inheritance and not be raised for the benefit of its representative."

C *Jackson* v. *Farrand* (4) is quite an anomalous case, and I lay no sort of stress upon it. There will still a question remain as to the interest of Vere Cotton.

I am of opinion, as there was a power of charging interest, that it should be considered as maintenance, for giving of interest is the same thing as giving an express maintenance, and whoever has maintained the daughter, will be entitled.

D As to the six years Mr. John Salisbury Cotton lived with his brother, if Sir Robert Cotton insists upon it, I cannot help allowing him something for maintaining him so long, for if a younger brother has a provision under a settlement and lives with the elder who is entitled to the estate so charged, he shall have an allowance for his maintenance. In this case HIS LORDSHIP directed Sir Robert's allowance for the maintenance to be paid out of the interest due to Mr. John Salisbury Cotton, upon his share of £675.

E HIS LORDSHIP declared that, Vere Cotton dying before such time as her portion became payable, the principal sum of £675 ought not now to be raised, but must sink into the estate charged therewith, for the benefit of the defendant, Sir Robert Salisbury Cotton, the heir-at-law, and did, therefore, order the plaintiff's bill, as far it sought to have the £675 raised for the portion of Vere Cotton, to be dismissed. As to the rest of the cause, he decreed that it be referred to the Master to take

F an account of what is due to the plaintiffs for their original portions of £675 apiece under the deed of July 27, 1687, with interest for the same at £5 per cent. from the death of Sir Thomas Cotton. The like direction with respect to the £675 of John Salisbury Cotton, and the maintenance which he received from his brother to be set against the interest. An account was directed to be taken likewise of what

G was due for the share of Mr. John Salisbury Cotton, of the sum of £5,000 provided for the portions of the younger children under the marriage settlement of 1701, with interest to be computed after at the rate of 4 per cent. from the time of John Salisbury Cotton's attaining the age of twenty-one, except when he was maintained by his brother, and then the maintenance to be set against interest.

It appearing there was no maintenance for Vere Cotton during her life, except

H the interest directed by the deed of 1687, HIS LORDSHIP declared that a reasonable allowance should be made for her maintenance during her life, equal to the interest of her portion of £675 at 5 per cent. from the death of Sir Thomas, her father, and did, therefore, decree the several sums before mentioned (the sum of £675 appointed to Vere Cotton excepted) to be raised by sale of the lands and premises comprised in the deed of Aug. 1, 1714, subject to the jointure of Lady Philadelphia, and out of the money arising by the sale, he decreed that the plaintiffs should be paid

I their original portions of £675 together with interest for the same as aforesaid, and as to the portion of £675 given to John Salisbury Cotton, he ordered that the same be divided into ten equal parts. As to what should be found due for the share of John Salisbury Cotton in the £5,000 provided by the settlement of July, 1701, it was decreed that the same be raised by mortgage or sale of part of the estate charged with these portions subject to Lady Philadelphia's jointure.

STILEMAN *v.* ASHDOWN AND ANOTHER

[Lord Chancellor's Court (Lord Hardwicke, L.C.), December 8, 1742]

[Reported 2 Atk. 477; 26 E.R. 688]

Fraudulent Conveyance—Setting aside—Protection of creditor—Joint purchase by father and son—Need to prove indebtedness of settlor at time of entering into voluntary settlement.

A purchase of property in the names of a father and his son as joint tenants is not an advancement to the son, for the father is entitled to the possession of the whole until a division of the property takes place and to a moiety absolutely after a division, and in addition he has a chance of obtaining the other moiety if he should survive the son. Therefore, a creditor was entitled to be let in upon the estates jointly purchased by the father and the son.

Per Lord Hardwicke, L.C.: It is not necessary that a man should be actually indebted at the time when he enters into a voluntary settlement to make it fraudulent. If a man does so with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside.

Notes. Considered: *Bott* v. *Smith* (1856), 21 Beav. 511. Applied: *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 101. Referred to: *Taylor* v. *Jones* (1743), 2 Atk. 600; *Dummer* v. *Pitcher* (1833), 2 My. & K. 262; *Crabb* v. *Crabb* (1834), 1 My. & K. 511; *Re Carroll (No. 2)*, [1930] All E.R.Rep. 192.

As to fraudulent conveyances impeachable by creditors, see 17 Halsbury's Laws (3rd Edn.) 650–664. For cases see 25 Digest (Repl.) 171 et seq.

Cases referred to:

(1) *Duranda* v. *Cooke* (circa) (1725–34), unreported.
(2) *Sagitary* v. *Hide* (1688), 2 Vern. 44; 23 E.R. 639, L.C.; 25 Digest (Repl.) 202, *226*.
(3) *Colvile* v. *Parker* (1607), Cro. Jac. 158; 79 E.R. 138; 25 Digest (Repl.) 247, *553*.
(4) *Anon.* (1699), Prec. Ch. 101; 24 E.R. 49; 25 Digest (Repl.) 194, *162*.
(5) *Jones* v. *Marsh* (1734), Cas. temp. Talb. 64; 25 E.R. 664, L.C.; 25 Digest (Repl.) 256, *638*.
(6) *Russel* v. *Hammond* (1738), 1 Atk. 13; West temp. Hard. 530; 26 E.R. 9, L.C.; 25 Digest (Repl.) 209, *277*.
(7) *Brown* v. *Jones* (1744), 1 Atk. 188; 26 E.R. 122, L.C.; 25 Digest (Repl.) 197, *179*.
(8) *Lanoy* v. *Duke of Athol* (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E.R. 668, L.C.; 40 Digest (Repl.) 669, *1625*.
(9) *Ward* v. *Shallet* (1750), 2 Ves. Sen. 16; 28 E.R. 11, L.C.; 25 Digest (Repl.) 197, *182*.
(10) *Ramsden* v. *Hylton*, *Hylton* v. *Biscoe* (1751), 2 Ves. Sen. 304; 28 E.R. 196, L.C.; 25 Digest (Repl.) 197, *180*.
(11) *Wheeler* v. *Caryl* (1751), Amb. 121; 27 E.R. 79, L.C.; 25 Digest (Repl.) 197, *180*.
(12) *Lamplugh* v. *Lamplugh* (1709), 1 P.Wms. 111; 2 Eq. Cas. Abr. 415; 24 E.R. 316, L.C.; 25 Digest (Repl.) 558, *81*.
(13) *Lord Grey* v. *Lady Grey* (1677), 1 Cas. in Ch. 296; 2 Swan. 594; Cas. temp. Finch, 338; 22 E.R. 809, L.C.; 25 Digest (Repl.) 558, *75*.
(14) *Elliot* v. *Elliot* (1677), 2 Cas. in Ch. 231; 22 E.R. 922, L.C.; 25 Digest (Repl.) 558, *74*.
(15) *Mumma* v. *Mumma* (1687), 2 Vern. 19; 23 E.R. 622, L.C.; 25 Digest (Repl.) 558, *77*.
(16) *Shales* v. *Shales* (1701), Freem. Ch. 252; 1 Eq. Cas. Abr. 382; 22 E.R. 1191; 25 Digest (Repl.) 558, *79*.

(17) *Bateman* v. *Bateman* (1702), 2 Vern. 436; 1 Eq. Cas. Abr. 218, 382; 23 E.R. 880; 25 Digest (Repl.) 558, *80.*

(18) *Taylor* v. *Taylor* (1737), West temp. Hard. 111; 1 Atk. 386; 26 E.R. 247; 25 Digest (Repl.) 559, *82.*

(19) *Hill* v *Ballard* (1748), 1 Ves. Sen. 77.

(20) *Christ's Hospital* v. *Budgin* (1712), 2 Vern. 683.

Bill brought by an executor to have satisfaction out of the estate of the defendant's deceased father on a judgment given by him to the plaintiff's testator for £120. The defendant, the eldest son of the conusor of the judgment, protected himself under a settlement made after the marriage of his father and mother in May, 1694, which settlement was made in part performance of an agreement before the marriage, and of £212 for the marriage portion of the wife, and in which the father was tenant for life, the mother tenant for life, and the defendant first tenant in tail.

In 1700 the father made a small purchase jointly with the defendant of £4 a year to them and their heirs. In 1708 he made another joint purchase with his youngest son of £5 a year for £105 and settled it by way of provision for younger children, and paid the purchase-money for both estates, and continued in possession until his death, which happened in 1735. The sons afterwards entered upon these small estates. The plaintiff contends that all the estates are subject to his judgment for £120 and that the settlement in 1694 was after marriage, and, therefore, voluntary.

Sir Dudley Ryder and *Floyer*, for the defendant: The father was not indebted at the time of the settlement which was made in consideration of a marriage portion of £250 and executed thirty-seven years before the judgment, which was not confessed until 1721, and made, too, in pursuance of an agreement before the marriage. If the proof should fail us here, the portion of the wife at least will help us, and it is incumbent upon the plaintiff to show that it was not paid at the time the deed bears date. For though there is no receipt for the £250 endorsed upon the deed, yet it is no objection, because at that time receipts on the back were not so frequent as they are now. This court will not give a judgment creditor a better right than he has at law, and, therefore, he ought to have his remedy there. The father and the sons were joint purchasers of the several estates in 1700 and 1708, and, therefore, the sons were not trustees for the father, as they were capable of taking the whole by survivorship, and on the death of the father all his right ceased, and the whole vested in the sons. In cases of voluntary settlements, whether the court will deem them fraudulent or not depends on the circumstances of the person at the time. Here the father executed it for the benefit of younger children. [*Duranda* v. *Cooke* (1) and *Sagitary* v. *Hide* (2) were cited.] Several depositions were read to prove the father of the defendants in good circumstances in 1694, in 1700, and in 1708, the times when the marriage settlement and the joint purchases were made.

Brown, for the plaintiff: It was highly improbable that the father's only view in the purchases should be a provision for the children. With regard to the eldest son, the whole estate under the settlement in 1694 was secured to him so that he was fully provided for, and, therefore, with respect to the plaintiff he can be considered in no other light than a stranger would be who had joined in a purchase with the father of the defendant. This is taken on the footing of a joint tenancy, and, therefore, is improper as a provision for a child, because the father might have sold a moiety, or, if the son had married, had children, and died before the father, the other moiety would have survived to the father. All these circumstances show that it was merely a purchase for the benefit of the father without any view to the advancement of the children, and it would be of dangerous consequence to suffer a father, by purchasing in joint tenancy with a son, to prevent creditors from being satisfied out of such estates upon the son's setting up a right of survivorship which did not accrue until some years after the debt existed.

People who have been in good circumstances are credited a long time after they are in a failing way, and, therefore, it is very difficult to point out the precise time when the father declined in his circumstances. As there is no other estate belonging to the father, and the whole is covered by joint purchases, the plaintiff must lose his debt unless these estates are liable.

LORD HARDWICKE, L.C.—As to some things this case is extremely clear. First, as to the settlement in 1694, though made after marriage, yet being in consideration of a portion which for anything that appears was paid at the time, I am of opinion it cannot be impeached by subsequent creditors: *Colvile* v. *Parker* (3); *Anon.* (4); *Jones* v. *Marsh* (5); *Russel* v. *Hammond* (6); *Brown* v. *Jones* (7); *Lanoy* v. *Duke of Athol* (8); *Ward* v. *Shallet* (9); *Hylton* v. *Biscoe* (10); *Wheeler* v. *Caryl* (11).

The second question is as to the joint purchases. The first was made by the father and his eldest son on Sept. 11, 1700, and the consideration money is admitted to have been paid by the father. The second purchase was made in 1708 by the father and William Ashdown, the youngest son, and the whole purchase money was advanced by the father. It has been insisted on the part of the defendants that these two purchases are to be considered, with respect to a moiety and on account of the survivorship, as an advancement of the sons, and, consequently, they are entitled to retain the estate and are not liable to the plaintiff's judgment.

As to that the general rule has been admitted, and has been long the doctrine of this court, that, notwithstanding the father pays the whole money, yet, if the purchase is made in the name of a younger son, the heir of the father shall not insist it is a trust for the father: *Lamplugh* v. *Lamplugh* (12); *Lord Grey* v. *Lady Grey* (13); *Elliot* v. *Elliot* (14); *Mumma* v. *Mumma* (15); *Shales* v. *Shales* (16); *Bateman* v. *Bateman* (17); *Taylor* v. *Taylor* (18); *Hill* v. *Ballard* (19). But the present case differs from this rule, or any other that I remember. If I can find any material difference, I shall in my own judgment be inclined to relieve the creditor, for though it may be proper stare decisis, yet I have thought the cases have gone full far enough in favour of advancements and that I ought not to carry it further. It must be admitted that in some of the cases which have been before the court, the father has continued in possession where the purchase has been made singly in the name of the son and yet held an advancement of the son, and for this reason that the father is the natural guardian of the sons during their minority.

Here the purchase is in the names of father and son as joint tenants. This does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division and to a moiety absolutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety. Nay, if the son had died during his minority, the father would have been entitled to the whole by virtue of the survivorship, and the son could not have prevented it by severance, he being an infant. Suppose a stronger case, that the father had taken an estate in the purchase to himself for life, with remainder to his son in fee, should this prevail against the creditor? No, certainly, for the father having the profits for life, and the son only a remainder, the estate would have been liable. A material consideration for the plaintiff is that the father might have other reasons for purchasing in joint tenancy, namely, to prevent dower upon the estate and other charges.

Consider how it stands in respect of the creditor. The father here was in possession of the whole estate and must necessarily appear to be the visible owner of it, and the creditor would have had a right by virtue of an elegit to have laid hold of a moiety, so that it differs extremely from all the other cases. It is very proper that this court should let itself loose as far as possible in order to relieve a creditor, and ought to be governed by particular circumstances of cases.

What can be more favourable for the plaintiff than that every foot of the estate is covered by these purchases, and unless I let him in upon these estates, the plaintiff has no possibility of being paid. It is not necessary that a man should

actually be indebted at the time he enters into a voluntary settlement to make it fraudulent, for if a man does so with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside. Therefore, I shall decree the creditor in this case to be let in upon the estates jointly purchased by the father and son. I think, taking it all together, the present case comes very near *Christ's Hospital* v. *Budgin* (20).

[His Lordship decreed that the estate of the defendant's father, which was in mortgage, a moiety of the premises purchased in 1700, and also a moiety of the premises purchased in 1708, be sold, and the money arising by sale of the mortgaged premises be applied first in payment of the mortgage and in the next place towards satisfaction of what should be found due to the plaintiff for principal and interest on their judgment and costs thereon and in this court. If that were not sufficient, the money arising on the sale of the two moieties should be applied towards satisfaction of what was remaining due to them. The surplus of the money arising by the sale of the premises purchased in 1700 should be paid to the defendant John Ashdowne, and the surplus of the money arising by sale of the premises purchased in 1708, should be paid to the defendant William Ashdowne.]

June 18, 1743. This decision was confirmed by His Lordship: see 2 Atk. 608.

R. *v.* SKINNER

[Court of King's Bench (Lord Mansfield, C.J.), Trinity Term, 1772]

[Reported Lofft., 54; 98 E.R. 529]

Slander—Privilege—Absolute privilege—Words spoken by magistrate in course of judicial proceedings—Words spoken of jury in execution of their office.

Magistrates—Contempt—Words spoken by magistrate opprobrious or irrelevant to case.

Per Lord Mansfield, C.J.—Neither party, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such inquiry, it will be punished suitably.

Notes. Considered: *Kennedy* v. *Hilliard* (1859), 1 L.T. 78; *Seaman* v. *Netherclift* (1876), 1 C.P.D. 540. Applied: *Munster* v. *Lamb*, [1881–5] All E.R.Rep. 791. Considered: *Hargreaves* v. *Bretherton*, [1958] 3 All E.R. 122. Referred to: *Dawkins* v. *Rokeby* (1873), L.R. 8 Q.B. 255 ([1874–80] All E.R.Rep. 994, H.L.); *Co-partnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405.

As to absolute privilege, see 24 Halsbury's Laws (3rd Edn.) 48 et seq.; and for cases see 32 Digest (Repl.) 121 et seq. As to criminal contempt, see 8 Halsbury's Laws (3rd Edn.) 17 et seq.; and for cases see 16 Digest (Repl.) 21 et seq.

Cases referred to:

(1) *R.* v. *Pocock* (1740), 7 Mod. Rep. 310; 2 Stra. 1157; 87 E.R. 1260; 15 Digest (Repl.) 848, *8153*.

(2) *R.* v. *Granfield* (1696), 12 Mod. Rep. 98; 88 E.R. 1191; sub nom. *R.* v. *Cranfield*, 5 Mod. Rep. 203; 15 Digest (Repl.) 848, *8156*.

Motion to quash an indictment against the defendant Skinner, one of His Majesty's justices of the peace of the town of Poole, for scandalous words spoken by him in a general session of the county, in which he said to the grand jury:

"You have not done your duty; you have disobeyed my commands. You are a seditious, scandalous, corrupt, and perjured jury."

Serjeant Davy in support of the indictment.

Lucas for the defendant: If the words were not spoken against the jury in the execution of their office, they are not words liable to an indictment; and if they were spoken, while they were sitting in the execution of their office, the judge was so too in his. The principle is clear, that a judge of a court of record is not liable to an indictment for words spoken by him sitting as a judge; especially, because it is not impossible to conceive the existence of a corrupt jury. If the charge was true against them, shall Mr. Skinner be subject to a process, in which he would have no power to justify, for the truth of the words spoken? In *R.* v. *Pocock* (1), on words spoken by the defendant of Kent, a sworn justice, saying: "He is sworn, and is a knave, and forsworn"; the court agreed that it was not actionable, because spoken with reference to a matter past, and not spoken against him in the execution of his office. *R.* v. *Granfield* (2). It would be impossible the authority of a judge could ever be supported, were they liable to the suit of any person, for words spoken by a judge as such.

LORD MANSFIELD, C.J.—What counsel for the defendant has said is very just. Neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such inquiry, it will be punished suitably.

The words here are extremely improper. If the party were not a borough justice, I should think there might be grounds to apply to the Great Seal to remove him from his office. But to go on an indictment would be subversive of all ideas of a constitution. If any precedent should be found, you should have time to make use of it, otherwise it would be proper to quash the indictment immediately.

ASTON *v.* ASTON

[Lord Chancellor's Court (Lord Hardwicke, L.C.), June 27, 1749, February 26, 1750]

[Reported 1 Ves. Sen. 264, 396; Belt's Supp. 134; 27 E.R. 1021, 1103]

Settled Land—Waste—Liability of tenant for life without impeachment—Act prejudicing estate—Pulling down mansion-house or farmhouses—Felling of timber.

Per Lord Hardwicke, L.C.: If a tenant for life without impeachment of waste pulled down farmhouses, in general I should find no more scruple in restraining him than I should from pulling down the mansion-house, save in a case where he pulled down two to make into one to bear the burden of but one, it tending equally to the destruction of the thing settled. If, therefore, he should grub up a wood settled so as to destroy the wood absolutely, I should restrain him. I have gone further and restrained the taking down trees [which are] for ornament and shelter to the house. The court ought in general to grant an injunction against a tenant for life without impeachment of waste for cutting down any timber not full grown or proper for building, or anything the doing of which might be a spoil or prejudice to the estate for the future.

Mortgage—Subsequent mortgagee—Interest in arrear—No ejectment by prior mortgagee—Redemption by subsequent mortgagee—Payment of interest.

If a prior mortgagee does not bring an ejectment to recover possession and

A the interest runs in arrear, a subsequent mortgagee shall, notwithstanding, not be permitted to redeem him without paying the whole interest so run on, because, though the second mortgagee could not enter, he was not without remedy, for he might have brought a bill to redeem and so had the estate himself.

Settled Land—Tenant for life—Remainderman—Right to timber blown down or cut by stranger—Loppings.

B Per LORD HARDWICKE, L.C.: It might be a considerable question whether, if timber was blown down or cut by a stranger, it would belong to him in whom the estate was vested in remainder or the tenant for life. Probably, I should think, it would belong to him in whom the estate was vested. . . . A tenant for life is entitled to the loppings.

C **Notes.** Referred to: *Chamberlayne* v. *Dummer* (1782), 1 Bro.C.C. 166; *Stackhouse* v. *Barnston* (1805), 10 Ves. 453; *Halliwell* v. *Phillips* (1858), 6 W.R. 408.

As to a tenant for life's liability for waste, see 34 HALSBURY'S LAWS (3rd Edn.) 649–658, and as to a mortgagee's right to possession see ibid., vol. 27, pp. 277–282. For cases see 40 DIGEST (Repl.) 695 et seq.; 35 DIGEST (Repl.) 451–457.

Cases referred to:

D (1) *Bowles's Case* (1615), 11 Co. Rep. 79 b; 77 E.R. 1252; sub nom. *Bowles* v. *Berrie*, 1 Roll. Rep. 177; 40 Digest (Repl.) 697, *1914.*

(2) *Vane* v. *Lord Bernard* (1716), 2 Vern. 738; 1 Eq. Cas. Abr. 399; 1 Salk. 161; 23 E.R. 1082, L.C.; sub nom. *Lord Bernard's Case*, Gilb. Ch. 127; Prec. Ch. 454; 40 Digest (Repl.) 698, *1926.*

(3) *Abrahal* v. *Bubb* (1679), 2 Show. 69; Freem. Ch. 53; 2 Swan. 172; 89 E.R.
E 798, L.C.; 40 Digest (Repl.) 696, *1911.*

(4) *Williams* v. *Day* (1680), 2 Cas. in Ch. 32; 22 E.R. 832, L.C.; 40 Digest (Repl.) 699, *1940.*

(5) *Cooke* v. *Whaley* (*Winford*) (1701), 1 Eq. Cas. Abr. 221, pl. 2, 400, pl. 5; 21 E.R. 1004, 1132; 2 Digest (Repl.) 115, *842.*

(6) *Packington's Case* (1744), 3 Atk. 215; 7 Bac. Abr. 291; 26 E.R. 925; 2 Digest
F (Repl.) 137, *1055.*

(7) *Charlton's Case* (circa 1730), cited in 1 Ves. Sen. at p. 265; sub nom. *Charlton* v. *Charlton*, cited in 3 Atk. at p. 216, L.C.; 40 Digest (Repl.) 698, *1931.*

(8) *Dayrell* v. *Champness* (1700), 1 Eq. Cas. Abr. 400; 21 E.R. 1131; 2 Digest (Repl.) 139, *1078.*

G **Bill** by the plaintiff, Lady Aston, to restrain the defendant, her daughter Catherine Aston, from proceeding on a bill for damages for waste filed by her against Lady Aston.

An estate, including the mansion-house and park, was settled on Lady Aston for her jointure without impeachment of waste except in pulling down houses and felling timber, remainder to her son Sir Thomas Aston for life without impeach-
H ment of waste generally, remainder to trustees to preserve contingent remainders, remainder to his issue in tail, remainder to his eldest sister (the defendant), and so to his other sisters in tail. Sir Thomas himself was tenant for life of the greatest part of the estate without impeachment of waste, and, he wanting a sum of money, the method thought on to raise it was by felling timber on the estate of which he was remainderman without impeachment of waste. Sir Thomas died without
I issue, and his sister, becoming tenant in tail, brought an action against her mother, Lady Aston, to enjoin her from committing further spoil on the estate and to recover treble damages for the waste which had occurred. She had a verdict, and Lady Aston filed a bill for a perpetual injunction to stay the proceedings thereon.

June 27, 1749. **LORD HARDWICKE, L.C.**—The questions before the court are of such a nature that they depend more on the latitude of discretion of a court of equity than many other cases, and are, therefore, more difficult for a judge to satisfy himself in the determination he is to give, which is to arise on the

circumstances of the case, than in other cases where he might be guided by particular rules. Yet the court must go by some rule and not make such a determination relating to property, especially real property, as may be attended with inconvenience and uncertainty. A

As to the first question, of the waste, consider it as it may in general concern a tenant for life without impeachment of waste under a settlement, for, though this is a particular case, the consideration of the general will give light therein. B

It is usual in marriage settlements to make the father tenant for life without impeachment of waste, and sometimes the words with full liberty to commit waste, are added, as here, to the husband's estate. But then it is most usual to insert restrictions, as "except in houses, etc." So in making a grandfather tenant for life in voluntary settlements and devises, so of father, owner of the estate, and making the settlement. This, therefore, may concern all such persons, and the question C is what a court of equity would do if it arose against persons in those circumstances. At common law that clause, "without impeachment of waste," only exempted a tenant for life from the penalty of the statute [Statute of Gloucester, 1278: repealed], the recovery of treble value and place wasted, not giving the property of the thing wasted, but in *Bowles's Case* (1) it was determined that these words also gave the property, the necessary consequence of which was that, unless in D particular circumstances, he was not to be restrained in equity, for that would be to determine that he should not make use of that property the law allowed him. But afterwards several instances were considered in which this very large power might be exercised contrary to conscience and in an unreasonable manner by a tenant for life, as where his act was to the destruction of the thing settled, which was the ground of *Lord Bernard's Case* (2), the strongest that could happen. Yet E that was not an original case without precedent or judicial opinion to support it, as appears from a case in 1607–8 (before *Bowles's Case* (1)) which probably occurred then, though the determination there did not operate on it.

If a tenant for life without impeachment of waste pulled down farmhouses, in general I should no more scruple in restraining him than I should from pulling down the mansion-house (unless where he pulled down two to make into one in order to bear F the burden but of one), it tending equally to the destruction of the thing settled. If, therefore, he should grub up a wood settled so as to destroy the wood absolutely, I should restrain him; which is the meaning of the words in that case in 1607–8, viz., "such voluntary, malicious, intended waste", and in *Abrahal* v. *Bubb* (3) (said to be in a manuscript of Lord Nottingham's collection, which I believe, I have also seen) it is termed "extravagant and humoursome waste." G So in *Williams* v. *Day* (4), where the Lord Chancellor declares he would stop the pulling down houses in the case of a tenant in tail "après possibility, etc.," which is carrying it a good way as he has power to commit waste, because the inheritance once was in him and also in the case of a tenant for life by express grant. So in *Cooke* v. *Whaley* (5). Since *Lord Bernard's Case* (2) I have gone further and restrained the taking down trees for ornament and shelter to the house as in H *Packington's Case* (6) and other cases, but a little further still in *Charlton's Case* (7). He was restrained from cutting down timber growing in an avenue and planted walk in a park, but it depended on the same principle, and though there was a lane between the house and the park, yet it was of the same kind with *Packington's Case* (6), where the house stood in the park, they being planted to answer the house and for its ornament and shelter. But there is no case of tenant I for life without impeachment of waste where it has gone further.

What is insisted on for the plaintiff is true in general—that law or equity does not depend on the particular cases, but on the general reason running through them, and, therefore, if a new case happens, not the same in specie, but essentially within them, the same rule ought to govern. It is, therefore, inferred that the court ought in general to grant an injunction against a tenant for life without impeachment of waste, for cutting down any timber not full grown or proper for building, or anything the doing of which might be a spoil or prejudice to the estate for the

future. Something of that kind might be wished for, but it is in general difficult to attain and inconvenient to do it. Nor does it fall within the reasoning of the case mentioned. Were the court to take such large strides, resort must always be to a court of equity, for no certain rule can be laid down as it cannot be taken from the value of the trees which will differ according to the sort and circumstances, nor from the purchase of estates, and some timber may be fit for one kind of building, not for others. But the reasoning of the cases of pulling down farm or mansion-houses, or trees for ornament or shelter does not come up to this, for the consequence of cutting down timber, perhaps too young, does not tend to the destruction of the thing settled, although it tends to its prejudice for a time; for timber will grow again in a few years: not so of houses. Nor will young trees planted in avenues pulled down serve for the purpose as before, for having been put there for the convenient enjoyment of the house, they are considered as appurtenant thereto, and can no more be destroyed by such tenant for life than the house itself. But it would be very dangerous for the court to use such a latitude as to extend this to the taking away the profits of the estate by a tenant for life to the prejudice of the remainderman which his estate for life without impeachment of waste gives him liberty to do.

This on the general question relating to tenant for life without impeachment of waste under a settlement. Next consider how it stands in the circumstances which are very special, and which distinguish it from the case of a father making a settlement on a son. It is all in his own handwriting. He does not appear to have been bred a lawyer, and though a counsel was said to be employed, there is no evidence thereof. It is natural to conclude that from the variety of expressions in the additional words to the clause, wherein he makes himself tenant for life, he thought there was some difference. Besides, the term for her reimbursement is extraordinary, and it is absurd to suppose he meant to leave her at liberty to cut down and strip the estate of every stick of timber (which are the natural botes for repairs) and then to come by this term to be reimbursed her expenses in buying timber for repairs, it being contrary to the plain intent which was that she should be tenant for life without impeachment of waste to prevent trouble in little matters, but still that the timber growing on the estate, and the natural fund for it, should be applied for that, but that she should be reimbursed out of this term what she should pay out of her own pocket. Therefore, as the defendant has cut down timber on this estate without applying it to repairs, she shall have no benefit of this term until she has reimbursed to the estate what she has so unreasonably cut away, and as to the future, the evidence being that she has left no timber fit even for repair of farmhouses, I will restrain her by the decree from cutting any more timber off the estate without leave of the court.

The next question is as to the demand of the arrear of £300 annuity, and the interest of the £3,100, to which, it is insisted that the defendant has lost her right upon two grounds, first, that she must be taken to have released this arrear to her son, or else that her permitting him to enjoy the estate without demanding it was in order to favour him fraudulently to the prejudice of the remainder. No authority is cited for such a resolution. Therefore, as it is a new case in specie, and the defendant expressly denies by her answer that she released or remitted it, but, on the contrary, hoped, he would pay her, it is only to be inferred from her laches and acts, and it is carrying it too far to say that because the owner of a charge upon an estate lets it run in arrear eight years, it must be presumed absolutely released. There is no such statute of limitation to bar her and no such length of time inferring presumption of payment.

It is compared to the case of pin-money suffered to run in arrear which shall not be allowed for more than one year. That, however, is not merely on a supposal of her having given them up to the husband, but on this, that having lived with the husband, she is supposed to have received satisfaction that way. But where the wife lived separate from the husband (which was the case of Lady Derby) and had no allowance from him, the court would decree an account as far back

as the arrears go, because there could be no such presumption, which shows that the cases of pin-money do not go on length of time. It is compared also to the case of bills of exchange where credit is given beyond a reasonable time, but that stands on a different reason. The drawer is presumed to have money in his hand to answer it, and, therefore, if the payee does not use diligence to get it, but suffers the drawer to go on, it is lost by his default in standing by and seeing the fund drawn out in a manner he ought not to do, and it does not go upon the intent to give it away. Then the case put of the mortgage concludes against the plaintiff. If a prior mortgagee does not bring an ejectment to recover possession and the interest runs in arrear, a subsequent mortgagee shall, notwithstanding, not be permitted to redeem him without paying the whole interest so run on, because, though the second mortgagee could not enter, he was not without remedy, for he might have brought a bill to redeem and so had the estate himself, but, if he did not, this court has often appointed a receiver to keep down the interest, which the court will not in general do unless where prior mortgagee will not enter, but, if he does not take that remedy, he shall not redeem without paying that arrear, and the mortgagee often suffers the arrear to run on with a design to get in the estate on which he lent his money and become the purchaser, which may be called an ill intent, yet shall he not lose his interest.

Fraud and collusion are never presumed, but must be proved, either expressly or by necessary consequence from the acts done. The defendant was very bountiful to her son, and though it may be called a deceit on the son's power to make a jointure, it was an honest one in this case, parting with her own money to induce him to marry. It must not be thence inferred that the defendant by this favour to her son intended to prejudice the remainder which she could not then see would come to the plaintiff as the son might have had issue who would come to the estate before the daughters of his father, nor can the defendant be presumed to have left this burden to prejudice such issue. There is no ground, then, that she should lose this demand. Another circumstance is admitted besides the not appearing, that she intended to remit this in favour of her son, viz., that the defendant has now seven daughters besides the plaintiff, who is owner of this large estate as tenant in tail, and it is reasonable for the mother to endeavour to increase her own personal estate to enable her to make a provision for the rest.

Feb. 26, 1750. **LORD HARDWICKE, L.C.**—This is a pretty extraordinary demand made by the defendant to recover not only single damages (this is no objection to the action), but also the treble value against the plaintiff, of which it does not appear the plaintiff received one shilling advantage, but it was taken for granted that Sir Thomas, the brother of the defendant, had the sole benefit of felling this timber.

It is plain whence this controversy has arisen, and it is unfortunate, but that will not be the measure of right between the parties, for courts of law and equity must determine on the grounds of that right let the motives of pursuing it be what they will. After the brother's death, it was found out in point of law that this was waste committed with the mother's consent during her estate for life of which no advantage could be taken during the mesne estate for life. The question is whether this court should permit that advantage to be taken at law or relieve against it. I am of opinion that there ought to be relief, for there is evidence either of an express consent by the defendant to her brother's cutting down the timber or a general tacit consent or encouragement on her part to do it, and, if that was given during the life of her brother as circumstances then stood, it would be very unreasonable to suffer her or her husband after the brother's death, and upon a change of circumstances by the value of the timber becoming greater to take advantage of it. Sir Thomas was in possession of the greater part of the estate on which he might have cut down without account, and, though unmarried, being young and likely to have children, consequently whatever information the defendant had it was not a matter she laid great weight upon. It might be a consider-

able question whether, if timber was blown down or cut by a stranger, it would belong to him in whom the estate was vested in remainder of the tenant for life. Probably, I should think, it would belong to him in whom the estate was vested: I should incline to think so from the reason of the thing, though not determined by any judicial determination.

When she was first acquainted with it, which I presume was before her marriage, she did not go to her mother, or object thereto, or tell Sir Thomas he had no power to do so. She knew she had some right to take this estate, whether of inheritance or not, if he died without issue. The answer imports she was sorry he should do this to his own prejudice, not her's, but it rests not there, for the evidence imports that she acquiesced with this power given her brother (and it is not material whether before or after her marriage, for though after marriage it would be evidence against herself), she considering him as the head of the family from whom she might expect favours, and would not enter into a contest with him for such a remote chance which might induce him to hurt the other part of the estate of which he was in possession. I do not rely on its being an express agreement, which might be pleaded at law, if so, but that it was an acquiescence and encouragement, which is sufficient to indemnify the mother. What equity against the executor of her brother in trover or other action is not the question but that she should have taken advantage of the illegality of the act at the time it was illegal. It does not clearly appear whether she knew her's to be a remainder in tail or for life. It is not very material that she did not know that she was tenant in tail, for, if she was tenant for life, subject to waste (if without impeachment of waste it would be very material), there is a great difference between a remainder of an estate falling into possession with timber upon it and when stripped thereof, for a tenant for life is entitled to the loppings, etc. It is determined here that where there is a tenant for life, remainder for life, remainder to the first and every other son of the last remainderman, if the first tenant for life subject to waste commits waste, the second tenant for life may bring a bill in this court to stay waste which cannot be demurred to: *Dayrell* v. *Champness* (8); and I take it that the court would do this to benefit the inheritance, where the law would not admit the action of waste to be brought.

In this case the mother might have let Sir Thomas have this liberty with great ease although the defendant had objected to it by the method mentioned, for I take it the first estate for life might be extinguished by the other, as in Perk. 113, A, title, Surrender, which gives the reason for it and is a good authority, and Bro. title Surrender 17. Consequently Sir Thomas might have done this lawfully, and no one could have called him to account for it, and the mother would have had the rents and profits of the estate for 99 years if she so long lived. The freehold's being nearer to the defendant would be no advantage, for the difference of having a naked freehold or an estate for 99 years in the mother is so slight that it is of no consequence. When this is the case, after this length of time and the brother's death, this court should not permit this advantage to be taken against the brother's executor. But the point I go on is that her conduct was an encouragement to draw the mother in.

The injunction, therefore, already granted ought to be made perpetual. But no costs at law or in this court, for I question whether on either side things were fully understood, and I believe there were some mistakes which ought not to turn so much to the benefit of one side and prejudice to the other.

Injunction made perpetual.

LORD GLENORCHY *v.* BOSVILLE

[Lord Chancellor's Court (Lord Talbot, L.C.), Michaelmas Term, 1733]

[Reported Cas. temp. Talb. 3; 2 Eq. Cas. Abr. 743; 25 E.R. 628]

Trust—Construction—Executed trust—Executory trust.

In cases of executed trusts or immediate devises the construction of courts of law and equity ought to be the same and should give effect to the legal meaning of the words, for there the trustor does not suppose any other conveyance will be made, but in executory trusts he leaves something to be done—the trust to be executed in a more careful and more accurate manner, and his intent should prevail over the strength and legal significance of the words.

Will—"Issue"—"Heirs"—Words of purchase or limitation.

Per Lord Talbot, L.C.: In construing a will the word "issue" may be a word of purchase. It may also be a word of limitation, but that it may be both in the same will has not, nor can be, proved. The word "heirs" is naturally a word of limitation, and when some other words expressing the testator's intent are added it may be looked on as a word both of limitation and purchase. But should the word "issue" be looked on as both in the same will, what a confusion would it breed, for the moment any issue was born, or any issue of that issue, they would all take.

Notes. Considered: *Read* v. *Snell* (1743), 2 Atk. 642. Referred to: *Meure* v. *Meure* (1737), 2 Atk. 265; *Roberts* v. *Dixwell* (1738), 1 Atk. 607; *Bagshaw* v. *Spencer* (1748), 1 Ves. Sen. 142; *Exel* v. *Wallace* (1751), 2 Ves. Sen. 318; *Austen* v. *Taylor* (1759), Amb. 376; *White* v. *Carter* (1766), 2 Eden, 366; *Keiley* v. *Fowler* (1768), Wilm. 298; *Jones* v. *Morgan* (1783), 1 Bro.C.C. 206; *Bold* v. *Hutchinson* (1855), 5 De G.M. & G. 558.

As to the construction of executed and executory trusts, see 38 Halsbury's Laws (3rd Edn.) 842; and as to the construction of wills, see ibid., vol. 39, pp. 950 et seq. For cases see 47 Digest (Repl.) 93–95; 49 Digest (Repl.) 761–784.

Cases referred to:

(1) *Backhouse* v. *Wells* (1712), 1 Eq. Cas. Abr. 184.

(2) *King* v. *Melling* (1671), 1 Vent. 214, 225; 86 E.R. 151; on appeal, 1 Vent. 232, Ex. Ch.; 48 Digest (Repl.) 398, *3454.*

(3) *Sparrow* v. *Shaw* (1729), 3 Bro. Parl. Cas. 120; 1 E.R. 1216; sub nom. *Shaw* v. *Weigh*, 8 Mod. Rep. 382; 1 Eq. Cas. Abr. 184, pl. 28; Fortes. Rep. 58; Fitz-G. 7; 2 Stra. 798, H.L.; 49 Digest (Repl.) 1226, *11,276.*

(4) *Leonard* v. *Earl of Sussex* (1705), 2 Vern. 526; 23 E.R. 940; 40 Digest (Repl.) 490, *40.*

(5) *Earl of Stamford* v. *Hobart* (1710), 3 Bro. Parl. Cas. 31; 1 E.R. 1157, H.L.; 47 Digest (Repl.) 95, *680.*

(6) *Legatt* v. *Sewell* (1706), 2 Vern. 551; Eq. Cas. Abr. 394, pl. 7.

(7) *Baile* v. *Coleman* (1711), 2 Vern. 670; 23 E.R. 1036; sub nom. *Bale* v. *Coleman*, 1 P.Wms. 142; 2 Eq. Cas. Abr. 309; 24 E.R. 330; 40 Digest (Repl.) 520, *311.*

(8) *Papillon* v. *Voice* (1728), 2 P.Wms. 471; Kel.W. 27; 1 Eq. Cas. Abr. 185, n.; 24 E.R. 819, L.C.; 47 Digest (Repl.) 78, *555.*

Bill for administration of a will.

By his will Sir Thomas Pershall devised all his real estate to his sister Anne Pershall and Robert Bosville, and their heirs and assigns, upon trust, that until his granddaughter Arabella Pershall marry or die, to receive the rent and profits thereof and out of it to pay her £100 a year for her maintenance, and, as to the residue, to pay his debts and legacies, and after payment thereof, then in trust for his said granddaughter and upon further trust, that, if she lived to marry a Protestant of the Church of England and at the time of such marriage be of the age of twenty-one, and such marriage be with the consent of her aunt, the said Anne Pershall,

then to convey the said estate with all convenient speed after such marriage to the use of the said Arabella for life without impeachment of waste, voluntary waste in houses excepted. The will provided for a remainder after her death to her husband for life, remainder to the issue of her body, with several remainders over, and upon further trust, that, if Arabella Pershall died unmarried, then to the use of Anne Pershall for life, remainder to the son of the testator's other granddaughter Francis Ireland in tail, remainder to Mr. Bosville, the defendant, for life, remainder to his first and other sons, remainder to the testator's right heirs and upon further trust, that, if his granddaughter married not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees; as to one moiety thereof, to the use of the said Arabella for life, remainder to trustees to preserve contingent remainders, remainder to her first and every other son, being a Protestant, with several remainders over, and as to the other moiety, to his daughter Ireland's son in like manner.

Sir Thomas Pershall died in 1722. Arabella Pershall attained her full age in 1723. In 1729, upon a treaty of marriage, she applied to the trustees for a conveyance of the estate to herself for life, remainder to her intended husband for life, remainder to the issue of her body, and a conveyance was executed by one of the trustees, but Mr. Bosville, the other trustee, who was also a remainderman, refused to convey. However, she, having by this conveyance a legal estate tail in one moiety and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee. In 1730 she married the plaintiff, Lord Glenorchy, who made a considerable settlement upon her. As to her own estate, she covenanted to settle it upon Lord Glenorchy and herself for life, remainder to the first and every other son of the marriage in tail male, and upon failure of such issue to the survivor of the said husband and wife in fee.

The bill was to have a conveyance of the moiety of the trust estate from Mr. Bosville to such uses as were limited by Lady Glenorchy in the said covenant. The principal question was whether under the will Lady Glenorchy was tenant for life or in tail. Upon which two other questions arose, viz., first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail, and, secondly, if so, whether the court would make any difference between a legal title, and a trust estate executory.

LORD TALBOT, L.C.—I should upon the first question make no difficulty of determining it an estate tail, had this been an immediate devise, but when you apply to this court for the carrying a trust estate into execution, the doubt is whether we shall not vary from the rules of law to follow the testator's intent, which will also bring on another question: What is the testator's intent in the present case?

Argument then took place on the second question.

Cur. adv. vult.

LORD TALBOT, L.C.—Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn, the testator having expressed himself variously in many if not in all of them. It is plain that by the first part of this will he intended Lady Glenorchy to have but an estate for life until marriage. Then comes the clause upon which the question depends. But before I give any opinion of that, I must observe that the trustee has not done right, for nothing was to vest until after her marrying a Protestant. The trustee, therefore, by conveying and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

The great question is: What estate shall she take? First, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only, so likewise of the remainder to the husband, but then come the words "remainder to the issue of her body" upon which the question arises. The word "issue" does, ex vi termini, comprehend all the issue, but sometimes a testator may not intend it in so large a sense. That it may be a word of purchase is clear from *Backhouse* v. *Wells* (1), and of

limitation by *King* v. *Melling* (2), but that it may be both in the same will has not, nor can be, proved. The word "heirs" is naturally a word of limitation, and when some other words expressing the testator's intent are added it may be looked on as a word both of limitation and purchase in the same will. But should the word "issue" be looked on as both in the same will, what a confusion it would breed, for the moment any issue was born, or any issue of that issue, they would all take. The question, then, will be whether Sir Thomas Pershall intended the Lady Glenorchy's issue to take by descent or by purchase. If by purchase, they can take but for life, and so every issue of that issue will take for life, which will make a succession ad infinitum, a perpetuity of estate for life. This inconvenience was the reason of SIR MATTHEW HALE'S opinion in *King* v. *Melling* (2) that the limitation there created an estate tail. It may be that the testator's intent is by this construction rendered a little precarious, but that is from the power of the law over men's estates and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterward construed to be estates tail. I do not say that where an express estate tail is devised that the annexing a power inconsistent with it will defeat the estate. No, the power shall be void. But here the power is annexed to the estate for life which she took first, and, therefore, I am rather inclined to think it stronger than *King* v. *Melling* (2), where there was no mediate estate, as there is here to the husband. There, there was an immediate devise, here a mediate one, so the applying this power to the estate for life carries no incongruity with it. As *King* v. *Melling* (2) has never been shaken, and *Shaw* v. *Weigh* or *Sparrow* v. *Shaw* (3), which went up to the House of Lords, was stronger, I do not think that courts of equity ought to go otherwise than the courts of law, and, therefore, am inclined to think it an estate tail as it would be at law.

There is another question, viz., how far in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words. I think in cases of trusts executed or immediate devises the construction of the courts of law and equity ought to be the same, for there the testator does not suppose any other conveyance will be made, but in executory trusts he leaves something to be done—the trusts to be executed in a more careful and more accurate manner. In *Leonard* v. *Earl of Sussex* (4), had it been by act executed, it would have been an estate tail, and the restraint would have been void, but, it being an executory trust, the court decreed according to the intent as it was found expressed in the will, which must now govern our construction. Though all parties claiming under this will are volunteers, yet are they entitled to the aid of this court to direct their trustees. I have already said what I should incline to if this was an immediate devise, but as it is executory and such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the resolution in *King* v. *Melling* (2), and as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, viz., to Lady Glenorchy for life, remainder to her husband, Lord Glenorchy for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In *Earl of Stamford* v. *Hobart* (5), it appeared that for want of trustees to preserve the contingent remainders all the uses intended in the will and in the Act of Parliament to take effect, might have been avoided, and, therefore, LORD COWPER did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In *Legatt* v. *Sewell* (6), the words, if in a settlement, would have made an estate tail, and in *Baile* v. *Coleman* (7) the execution was to be of the same estate he had in the trust which in construction of law was an estate tail. Nor is the rule generally true that in articles and executory trusts different constructions are to be admitted. *Papillon* v. *Voice* (8) is directly against this, and it seems to me a very strong authority for executing the intent in the one case as well as the other.

Decreed that Lady Glenorchy had an estate for life, with remainder, etc.

A

SIDNEY *v.* SIDNEY

[Lord Chancellor's Court (Lord Talbot, L.C.), Easter Term, 1734]

[Reported 3 P.Wms. 269; 2 Eq. Cas. Abr. 29; 24 E.R. 1060]

B *Husband and Wife—Jointure—Dower—Wife guilty of adultery—Curtesy estate—Adultery by husband.*

The claim of a wife to a jointure secured by a marriage settlement was not barred by her elopement and adultery. On the other hand, her right of dower was forfeited by her committing adultery unless there was a reconciliation with her husband: see Statute of Westminster the Second, 1285, c. 34 (5 C Halsbury's Statutes (2nd Edn.) 422). A husband's right of curtesy was not affected by his leaving the wife and living in adultery.

Notes. The Statute of Westminster the Second, c. 34, was repealed as regards deaths after 1925 by the Administration of Estates Act, 1925 (9 Halsbury's Statutes (2nd Edn.) 718), which also abolished dower and curtesy with a saving where the husband or wife died before Jan. 1, 1926.

D Considered: *Clarke* v. *Periam* (1741), 2 Atk. 333; *Seagrave* v. *Seagrave* (1807), 13 Ves. 439; *Jee* v. *Thurlow* (1824), 2 B. & C. 547. Applied: *Duncan* v. *Campbell* (1842), 12 Sim. 616; *Evans* v. *Carrington* (1860), 2 De G.F. & J. 481; *Fearson* v. *Earl of Aylesford* [1881–5] All E.R.Rep. 778. Referred to: *Wheeler* v. *Trotter* (1737), 3 Swan. 174, n; *Watkyns* v. *Watkyns* (1740), 2 Atk. 96; *Legard* v. *Johnson* (1797), 3 Ves. 352.

E As to jointure, see 34 Halsbury's Laws (3rd Edn.) 495, 496. As to a husband's right of curtesy and a wife's right to dower, see ibid., vol. 32, pp. 299–308. For cases see 40 Digest (Repl.) 532; 38 Digest (Repl.) 802 et seq.

Cases referred to:

(1) *Re St. George's and St. Margaret's, Westminster* (1706), 1 Salk. 123.

F (2) *Powel* v. *Weeks* (1604), Noy, 108.

(3) *Pendrell* v. *Pendrell* (1732), 2 Stra. 925; 93 E.R. 945; 3 Digest (Repl.) 403, *45.*

Bill brought by the plaintiff, Elizabeth Sidney, against the defendant, her husband, Jocelyn Sidney, for an order for the specific performance of her marriage articles dated Oct. 17, 1716, and for an account.

G By these marriage articles the defendant covenanted that within eight months after the plaintiff should come of age he would convey his estate in Glamorganshire to trustees to the use of himself for life, remainder to the use of trustees to support contingent remainders, remainder to the use of his wife for her life for her jointure, remainder to their sons successively in tail male, remainder to the daughters in tail, remainder to himself in fee. The wife, with the consent of her guardians, covenanted that she would, within eight months after she should come H to age, convey her estate in the same county, being about £350 per annum (but well stocked with timber) to the use and intent that there should be paid thereout to her £100 per annum for her separate use during the coverture, £100 per annum to her mother, and £50 per annum to her sister, till she should come to age, and then she to have £1,000, and that her estate thus charged should be conveyed to the use of the husband for life, remainder to the use of the wife for I life, remainder to the use of the first son in tail male, remainder to the daughters in tail, remainder to her right heirs. The timber on her estate was to be applied to pay off a mortgage of £5,000 on the husband's estate, and the surplus of the money arising by the sale of the timber was to go to raise portions for younger children. So that the bill was to compel the husband to perform his part of the articles, and that he might account for the timber he had cut down from off the wife's estate.

The husband, by his answer, set forth that the wife had withdrawn herself from her husband, and had lived separately and very much misbehaved herself. The

proofs were very strong that the wife had had criminal conversation with another man, but in the depositions there being some evidence that the husband was also guilty of the like offence, so that the wife might recriminate, the Master of the Rolls decreed a performance of the articles, from which decree the defendant now appealed to the LORD CHANCELLOR.

It was contended on behalf of the husband that, considering the encumbrances and annuities on the wife's estate, the husband was a very little gainer therefrom; that the wife in a court of equity appeared with but an ill grace, as endeavouring to compel a performance of her husband's agreement when she herself had broken her own marriage contract in the most sacred and tender part of it; that with regard to articles, if the court found that any inconvenience would result from compelling a performance thereof, they would not decree that those should be specifically executed, but would leave the party to his remedy at law; and that in the present case, the decreeing an execution of the articles might occasion a disinherison of a lawful heir and settle the estate upon such issue as, though born in wedlock, might yet in fact be illegitimate. Suppose that in this case, after the separation, there had been a son born, would this court have decreed a settlement to have been made whereby such son should have been entitled? Yet that would plainly have been the consequence since such son, being born in wedlock, must have taken by virtue of the settlement. Where a separation had been in pursuance of a divorce, the courts at law would presume that the husband and wife had lived separately in obedience to the sentence, but in the case of a voluntary separation only, the husband's access to the wife should be taken for granted, and a child born should be construed legitimate, and no evidence admitted to the contrary; according to the distinction in 1 Salk. 123 [*Re St. George's and St. Margaret's Parishes, Westminster* (1)], at the same time it might be notorious to everyone that such child was not begotten by the husband. In the present case it was in proof that the wife left her husband and eloped with one James Jenkins to a cottage about three miles from where her husband lived, since which there had been no pretence of any reconciliation, so that this was a bar of dower: 1 INST. 32; 1 ROLL. ABR. 680. If in a court of law the wife, behaving in this manner, would not be helped to her dower, which is supposed to be her bread and subsistence, why should equity assist such a woman so as to cause any articles to be performed in her favour, which is a matter always left to the discretion of the court? The wife in the present case had her remedy at law upon an action of covenant to be brought in the name of the trustees, but it might well be doubted whether the husband had any remedy against the wife having regard to the fact that at the time of the marriage she was an infant, and her covenant with the trustees would hardly bind her at law.

It was admitted, had there been an actual jointure made upon the wife so as to have vested a fixed legal estate in her that could not have been forfeited by the wife's elopement, but where the matter rested only upon articles and the wife had no remedy but by bringing a bill for the specific performance thereof a court of equity might with the greatest reason and justice refuse to lend a helping hand—might well deny that assistance which in a case of common articles and in a fair and honest cause the court is ready to afford the parties. It had, indeed, been said [in *Powel* v. *Weeks* (2)], that adultery was no bar of dower, and probably it was not where the husband and wife continued to cohabit, but no books said that where the wife eloped with another man in adultery (as in the present case) that was not a bar of dower. Surely, if it be a bar to a recovery at law, it was at least equally reasonable it should be so with respect to any aid sought in equity upon articles for the wife's provision.

Further, it was said to be material that in the case of elopement by the wife, nothing could restore her to her dower, but the reconciliation of the husband. It was not sufficient, so as to entitle her to her dower, that she could recriminate or say that her husband was guilty of the like offence, for nothing could avail her as to that but the forgiveness of the injured husband.

Very observable also was the difference which the law made where the offence of adultery was committed by the husband and where by the wife. In the former case, where the husband went away from the wife and lived with another woman in adultery, that was no bar to the husband's being tenant by the curtesy, but on the wife's leaving her husband and eloping with an adulterer, she thereby forfeited her dower. The reason of that might be that the consequence of such a crime in the wife was worse to the husband's family by making the children which she might have by the adulterer inheritable to the husband's estate to the prejudice of the next heir, whereas the husband's children begotten on another woman were incapable of bringing that mischief on a family or injuring the next legitimate heir. All that was greatly aggravated in the present case by reason of the near alliance which the husband had to an ancient illustrious peerage, attended with a suitable estate, being only brother and presumptive heir to the Earl of Leicester, a bachelor, so that the matter of recrimination, though the principal ground of HIS HONOUR'S decree, was not sufficient to warrant the same.

It has been objected below that the husband had not by his answer put the matter of adultery in issue, it being only said that the wife had withdrawn herself from her husband, lived separately, and very much misbehaved herself, all of which she might do and not be guilty of adultery since there might be several acts of misbehaviour in a wife besides that of adultery. But the wife could not but be sensible of what nature her misbehaviour was. That must be best known to herself, and it was the kindness and tenderness which the husband had for the character of his wife not to suffer those great stains upon her reputation to be registered upon record to the perpetual infamy of herself and family. Therefore, before he should go so far the husband might well hope his wife would repent of her fault and put a stop to this so unseasonable a suit, and it was a sad excuse made on behalf of the wife to say that the husband, who had just reason to charge her in the plainest and most distinct terms with the infamous crime of adultery, had in tenderness to her forborne to do so, and now she would take advantage of it, thus with equal art and ingratitude turning the kindness that had been shown her against him who showed it.

Then it had been objected that, supposing this crime to have been ever so sufficiently set forth, yet this court could not judge of adultery or in any sort punish it, which was proper only for the spiritual court. Where, however, things of that nature were incidentally mixed with others the courts of law (and much more of equity) might take notice of them. Thus courts of law, where the wife's elopement with the adulterer was pleaded in bar of dower, must try such a plea, and, as they might do it in that case, what should hinder this court from doing the like in the present? So the trial of a marriage, which was as much of a spiritual cognisance as anything could be, was determinable at law where it came incidentally in question.

Thirdly, it had been said that, if the defendant insisted that the wife ought not to have aid on the articles, then he himself was not to expect any aid or assistance in respect thereof. All that might be admitted, and the husband would be in a better condition without the articles, than with them. Independent of the articles he would be entitled to the rents and profits and have a power to sell all the timber from off his wife's estate to his own use.

Lastly, it was observed that the husband was not plaintiff in this cause, but the wife, and where she had thought fit to apply in a cause of turpitude, as a court of equity had frequently been resembled to a fountain distributing its relief through pure and clear streams, so it was hoped that the present claim being of a contrary nature and consisting of several proofs of turpitude, therefore, the court would not afford the plaintiff the least favour or assistance whatever.

LORD TALBOT, L.C.—What has been asserted of a child begotten and born during the time of the voluntary separation of the husband and wife, namely, that no evidence shall be admitted to prove the illegitimacy of such child, is now held

to be otherwise. For if a jury find the husband had no access, such child will be a bastard according to the determination in *Pendrell* v. *Pendrell* (3). As in the present case the defendant has insisted upon what might have been very penal to the plaintiff his wife, namely, the forfeiture of her dower, the crime for which she might have incurred such a penalty ought to be plainly laid to her charge, specified and put in issue so that she may know what to rest her defence upon. But here the accusation is only general and uncertain, amounting to little else than that she has withdrawn herself from her husband, lived separately from him, and very much misbehaved herself, nothing of which implies that she has been guilty of adultery, much less that she has eloped from him and gone away with an adulterer, which alone would bar her of her dower supposing that this were purely a question of dower. The articles being that the husband shall settle such and such lands in certainty on his wife for her jointure, this is pretty much in the nature of an actual and vested jointure. What is covenanted for a good consideration to be done is considered in equity in most respects as done; consequently, this is a jointure and not forfeitable either by adultery or an elopement. The reason of the difference, why a wife in case of an elopement with an adulterer forfeits her dower and yet a husband leaving his wife and living with another woman does not forfeit his tenancy by the curtesy, is because the Statute of Westminster the Second, 1285, c. 34 [relating to dower: 5 HALSBURY'S STATUTES (2nd Edn.) 422], does by express words, under these circumstances create a forfeiture of dower, but there is no Act inflicting, in the other case the forfeiture of a tenancy by the curtesy.

As to the recrimination appearing in the proofs, this does not seem to me so much to affect the case. Indeed, with regard to the evidence of the crime in the wife there seems to be sufficient to convince any third person that she is not innocent, but, the same not being put in issue in the cause, I cannot judge of it. I affirm the decree, and direct the husband to perform his marriage articles and account for the timber which he has cut on the wife's estate contrary to the articles.

WILLOUGHBY *v.* WILLOUGHBY AND OTHERS

[Lord Chancellor's Court (Lord Hardwicke, L.C.], June 19, 1756]

[Reported 1 Term Rep. 763; 2 Ves. Sen. 685; Amb. 282; 99 E.R. 1366]

Sale of Land—Title—Prior conveyance—Bona fide purchase for value without notice.

Mortgage—Priority—Prior mortgage—Second mortgagee acting bona fide for value without notice.

The purchaser or mortgagee of an estate will be protected against a prior conveyance or encumbrance if he is a bona fide purchaser for value, not affected with any fraud or collusion, and without notice, express or implied, of the prior conveyance or encumbrance. A purchaser or mortgagee can avail himself of this doctrine if he gets in the legal estate or acquires the best right to call for it. If a puisne purchaser or mortgagee has notice of the prior purchase or incumbrance, he cannot avail himself of the assignment of the term, but will be decreed to reconvey it or procure it to be reconveyed.

Notes. Considered: *Maundrell* v. *Maundrell* (1805), 10 Ves. 246; *Earl Cholmondeley* v. *Lord Clinton* (1820), 2 Jac. & W. 1. Referred to: *Doe d. Putland* v. *Hilder* (1819), 2 B. & Ald. 782; *Mole* v. *Smith* (1822), Jac. 490; *Jones* v. *Jones* (1838), 8 Sim. 633; *Drew* v. *Lockett* (1863), 32 Beav. 499; *Sharples* v. *Adams* (1863), 32 Beav. 213; *Chadwick* v. *Turner* (1865), 5 New Rep. 395; *Pease* v. *Jackson* (1868), 3 Ch. App. 576; *Pilcher* v. *Rawlins*, *Joyce* v. *Rawlins* (1870), L.R. 11 Eq. 53; *Frend* v. *Buckley* (1870), L.R. 5 Q.B. 213.

As to purchase for value without notice, see 14 Halsbury's Laws (3rd Edn.) 534–537, and ibid., vol. 34, pp. 302–305. As to priority between mortgagees, see ibid., vol. 27, pp. 217–221. For cases see 20 Digest (Repl.) 314 et seq.; 35 Digest (Repl.) 502 et seq.

Cases referred to:

(1) *Tiffin* v. *Tiffin* (1680), 2 Cas. in Ch. 49, 55; 1 Vern. 1, L.C.

(2) *Best* v. *Stampford* (1705), 2 Vern. 520; Prec. Ch. 252.

(3) *Hayter* v. *Rod* (1717), 1 P.Wms. 360.

(4) *Whitchurch* v. *Whitchurch* (1724), 2 P.Wms. 236; Gilb. Ch. 168; affirmed sub nom. *Whitechurch* v. *Whitechurch* (1725), 9 Mod. Rep. 124; 1 Stra. 619.

(5) *Lord Dudley* v. *Lady Dudley* (1705), Prec. Ch. 241; 24 E.R. 118, L.C.; 20 Digest (Repl.) 252, *1.*

(6) *Rich* v. *Rich* (1684), 2 Cas. in Ch. 160.

(7) *Wilkes* v. *Bodington* (1707), 2 Vern. 599; 23 E.R. 991, L.C.; 20 Digest (Repl.) 326, *617.*

(8) *Oxwick* v. *Brockett* (1698), 1 Eq. Cas. Abr. 355; 21 E.R. 1098, L.C.; 20 Digest (Repl.) 278, *230.*

(9) *Duke of Norfolk's Case* (1683), 3 Cas. in Ch. 1; 2 Swan. 454; Freem. 72, 80; Poll. 223; 2 Rep. Ch. 229; 22 E.R. 931, L.C.; reversed sub nom. *Duke of Norfolk* v. *Howard*, 1 Vern. 163; restored sub nom. *Howard* v. *Duke of Norfolk* (1685), 14 Lords Journals, 49, H.L.; 37 Digest (Repl.) 78, *187.*

(10) *Bodmin* v. *Vandebenden* (1685), 2 Cas. in Ch. 172, L.C.; affirmed sub nom. *Countess of Radnor* v. *Vandebendy* (1697), Show. Parl. Cas. 69; 1 E.R. 48; sub nom. *Lady Radnor* v. *Rotherham* (*Rotheram*), Freem. Ch. 211; Prec. Ch. 65, H.L.; 47 Digest (Repl.) 184, *1531.*

(11) *Brace* v. *Duchess of Marlborough* (1728), 2 P.Wms. 491; Mos. 50; 24 E.R. 829; 20 Digest (Repl.) 317, *551.*

Bill for the enforcement of the provisions of a marriage settlement and other relief.

George Willoughby, the husband of the plaintiff Jane, being seised in fee subject

to a mortgage-term for years, on Nov. 12, 1717, in consideration of, and previous to, his marriage with the plaintiff, entered into articles to settle the estate to the use of himself for life, then to secure a jointure of £350 per annum to the plaintiff Jane, remainder to the first and other sons of the marriage in tail-male, remainder to the first and others sons of the marriage in tail-male, remainder to George Willoughby in fee, with power to charge the premises by deed or will with £3,000 for younger children's portions. On Mar. 24, 1718, settlements were made in pursuance of the articles. On Aug. 17, 1718, the old term was assigned to Skylling and Popham, upon an express trust declared, in trust for George Willoughby, his heirs and assigns, to attend and wait upon the freehold and inheritance of the premises, and to be subservient thereto. On Mar. 24, 1750, George Willoughby made his will, and executed his power by charging the estate with £3,000 for his younger children. He afterwards died, leaving the plaintiff Jane, his widow, and the defendant Henry Willoughby, his eldest son, together with three daughters and a younger son George, co-plaintiffs with the mother. The plaintiff Jane was entitled under the marriage settlement to her jointure of £350 per annum. The defendant Henry, who was tenant in tail under the marriage settlement, suffered a common recovery and barred the entail, and declared the use to trustees and their heirs upon trust to the use of such person and persons, and for such estate and estates, as he, Henry Willoughby, by deed should appoint. He afterwards borrowed £870 of his mother, and by an appointment mortgaged the estate to her for a term of 500 years. During all this time the old term remained outstanding in Skylling and Popham, but on June 15, 1752, the defendant Henry borrowed £800 from the defendant Jeffery Cripps, and for securing it mortgaged the premises to Cripps in fee. On the same day Skylling, the surviving trustee in the assignment of the old term to attend the inheritance, by the direction of the defendant Henry, assigned that term to the defendant Alexander Boote in trust to protect Cripp's mortgage of the fee. It appeared in evidence that previous to the taking of this mortgage, and on that occasion, Cripps had full notice of the marriage articles, notwithstanding which he took a covenant in the mortgage deed from the defendant Henry that the premises were free from all encumbrances except one indenture of assignment of the old term to the defendant Boote and the said term and the mesne assignments thereof in the said last assignment mentioned. It did not appear that the defendant Cripps had any notice of the mortgage made by Henry to the plaintiff his mother.

The plaintiff Jane, the mother (together with her younger son and daughters), brought the present bill to have the benefit of her jointure under her marriage settlement, and to have a sale of the estate subject to her £350 per annum, and out of the money arising by the sale to be paid the arrears of her jointure, next the provisions for the younger son and the daughters, and then her mortgage for £870 and the other encumbrances in their order. The defendant Cripps, the puisne mortgagee, submitted that the plaintiff Jane's jointure and the provisions for the younger children should be preferred, but contended that his mortgage ought to be preferred in payment to that of the plaintiff Jane, the legal estate of the prior term being vested in the defendant Boote, his trustee, and he being a purchaser by his second mortgage without notice of the first.

LORD HARDWICKE, L.C.—The defendant Cripps, the legal estate of the term being in a trustee for him, has both law and equity on his side, while the plaintiff Jane has only an equity as against the term.

Two questions have been argued at the Bar: (i) a general question, whether, this term having been assigned to Skylling and Popham upon an express trust declared to attend upon the freehold and inheritance and to be subservient thereto, the defendant Cripps could in equity have had the benefit of it to protect his mortgage both against the jointure, the provisions of the younger children, and the prior mortgage, even supposing he had had no notice of any of them; (ii), a particular question, whether the defendant Cripps, having full notice of the marriage

A settlement, the jointure, and portions, and consequently not being entitled to the entire absolute benefit of the legal estate of the old term, can be preferred to the plaintiff Mrs. Willoughby even as to her mortgage, or must come in only according to his priority in order of time.

The first question depends upon three considerations: (i) What is the nature of a term attendant upon the inheritance? (ii) What kind of grantee or owner B of the inheritance is entitled to the protection of such a term? Or, in other words, in whose hands shall such a term be allowed to protect the inheritance? (iii) Against what estates, charges, or encumbrances, the protection arising from such a term shall extend?

(i) What is the nature of a term attendant upon the inheritance? The attendance of terms for years upon the inheritance is the creature of a court of equity, C invented partly to protect real property and partly to keep it in the right channel. In order to it this court framed the distinction between such attendant terms and terms in gross, notwithstanding that in the consideration of the common law they are both the same and equally keep out the owner of the fee so long as they subsist. But as equity always considers who has the right in conscience to the land and on that ground makes one man a trustee for another, and as the common D law allows the possession of the tenant for years to be the possession of the owner of the freehold, this court said, where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his cestui que trust, nor, pari ratione, obstruct him in doing any acts of ownership, or in making any assurances of his estate. Therefore, in equity such a term of years shall yield, ply, and be moulded, according to the uses, estates, or charges which the owner of the inherit- E ance declares or carves out of the fee.

Thus the dominion of real property was kept entire. Of this we meet with nothing in our books before Queen Elizabeth's reign, when mortgages by long terms of years began to come into use. Before that time, the law looked upon very long terms with a jealous eye, and laid them under violent presumptions of fraud because they tended to prevent the Crown of its forfeitures and the lord F of the fruits of his tenures. Neither could there, much before that time, be any use of a term attendant upon the inheritance to preserve the limitations of a settlement in many cases because the tenant for years was in the power of the owner of the freehold, until the statute 21 Hen. 8, c. 15 [Recoveries Act, 1529: repealed Statute Law Revision Act, 1863] which enabled him to falsify a recovery against the tenant of the freehold. Till then, by such a recovery the term was gone, and, G consequently, could attend upon nothing. But since the law was altered by that statute and the term was preserved, this court could lay hold of it. Proceeding upon these principles, wherever a term for years has been vested in a stranger in trust for the owner of the inheritance, whether by trust expressly declared or by construction or judgment of this court, which is called a trust by operation of law, this court has said that the trust or beneficial interest of such a term shall follow H or be affected by all such conveyances, assurances, or charges, as the owner creates of the inheritance. Although the law says that, the term and the fee being in different persons, they are separate distinct estates and the one not merged in the other, yet the beneficial and profitable interest of both being in the same person, equity will unite them for the sake of keeping the property entire. Therefore, if the owner of the inheritance levy a fine sur conusance de droit or suffer a common I recovery to uses, the trust of the term shall follow and be governed by those uses although a term for years is not the subject of a fine sur conusance de droit, much less of a common recovery, nor would equity allow the trust of a term in gross to be settled with such limitations.

This doctrine is always allowed to have its full effect as between the representatives, that is, the heir either in fee simple or fee tail of the owner of the inheritance, and the executor, and all persons claiming as volunteers under him, though certain distinctions have been admitted as to creditors which are not material to the present case. In general, the rule has been the same, whether the trust of the

term be created by express declaration, or arise by construction and judgment of this court. On this ground are *Tiffin* v. *Tiffin* (1); *Best* v. *Stampford* (2); *Hayter* v. *Rod* (3); *Whitechurch* v. *Whitechurch* (4), before the lords commissioners in 1725; and *Lord Dudley* v. *Lady Dudley* (5); *Rich* v. *Rich* (6), which was a case on the custom of London. All these cases were cited at the Bar, and I choose to put them together without stating them particularly, because they all tend only to prove this general proposition. But although in all these cases this court considers the trust of the term as annexed to the inheritance, yet the legal estate of the term is always separate from it, and must be so, otherwise it would be merged. This gives the court an opportunity to make use of such terms as a guard and protection to an equitable owner of the inheritance against mesne conveyances which would carry the fee at common law, or to a person who is both legal and equitable owner of the inheritance against such mesne encumbrances as he ought not to be affected with in conscience. Here the court often disannexes the trust of the term from the strict legal fee, but still in support of right. This brings me to the second consideration.

(ii) What kind of grantee or owner of the inheritance is entitled in this court to the protection of such a term? Or, in other words, in whose hands shall such a term be allowed to protect the inheritance? In the first place, he must be a purchaser for a price paid or for a valuable consideration. He must be a purchaser bona fide, not affected with any fraud or collusion. He must be a purchaser without notice of the prior conveyance or of the prior charge or encumbrance, for notice makes him come in fraudulently. Here, when I speak of a purchaser for a valuable consideration, I include a mortgagee, for he is a purchaser pro tanto. If he has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance or of some prior charge or encumbrance, and if he also takes an assignment of the term to a trustee for him or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him, that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance.

This made me say that in those cases the court often disannexes the trust of the term from the strict legal fee, but still in support of right. For if a man come in fairly and bona fide, and has paid a price for the land, and has acquired an estate in it which the law will support (a plank by which at law he may save himself from sinking), there can be no ground in equity or conscience to take it from him. This is the meaning of what is generally expressed by saying that where a man has both law and equity on his side, he shall not be hurt in a court of equity. It was once doubted whether, if the term were vested in a third person, a trustee generally, and not in the party himself, he should be allowed the benefit of it in equity, because the court ought to determine for whom the stranger was a trustee, and then the rule is qui prior est tempore potior est jure. This was settled by Lord Cowper in *Wilkes* v. *Bodington* (7). He lays it down to be a rule in equity that where a man is purchaser for a valuable consideration without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better right to call for a legal estate than his adversary. For this reason His Lordship dismissed the bill. But here I desire it may be observed that he must have the better right to call for an assignment of the legal estate, for the sake of the use I shall make of it afterwards.

(iii) The third consideration is against what estates, charges, or encumbrances, the protection arising from such a term shall extend? The answer to this question may, I think, be laid down very generally—against all estates, charges, and encumbrances, created intermediate between the raising of the term and the purchase. But here I desire to be understood to take in all the qualities or requisites before laid down, valuable consideration, bona fides, and entire fairness in the purchase, freedom from notice either express or implied, and the having of the first and

best right to call for the legal estate of the term. All these must concur to warrant this protection. Here arises the distinction whereupon great stress was laid for the plaintiff in this cause, which was much laboured. First, it was admitted that this will be so where the old term is standing out in the original mortgagee or grantee of it or his representatives and has never been assigned to attend the inheritance, but that where it has been so assigned upon an express trust, it shall attend the first limitations of the inheritance and all the estates derived out of it. It shall protect them as here the uses of the marriage settlement and the subsequent purchaser without notice can no ways gain the benefit of it. Secondly, that where it is so assigned upon an express trust to attend the inheritance, it is become so annexed to that inheritance that it cannot be severed from it. But the argument is not well-founded. It is an attempt to establish a new distinction between a term attendant upon the inheritance by express declaration of the trust and a term so attendant by construction or judgment of a court of equity. No authority or precedent of this court has been cited to warrant this distinction, and the only case, where anything of that nature appears, is to the contrary. I mean *Oxwick* v. *Brockett* (8) in 1 Eq. Cas. Abr. 355. How authentic that report is I cannot take upon me to say, for the decree is not entered in the Register's Book and the minutes are so imperfect that nothing material can be collected from them except that there was an assignment of a mortgage term to attend the inheritance in the case. Let us then examine the grounds of this difference.

First, it was urged that where a term appears to be assigned expressly to attend the inheritance, it is notice to a purchaser or mortgagee that there are some limitations of the inheritance to be protected by it, and, if so, the purchaser or mortgagee takes his assignment of it with notice. But I take this to be a mistake. It is notice of nothing but that there is an inheritance to be protected and that the term is attendant. And it does by no means imply that the inheritance is settled or bound by special limitations, for a satisfied term may be and often is, assigned to attend an inheritance in fee simple as well as a fee tail, or an estate carved out by particular uses and limitations. It, therefore, gives notice to a purchaser of nothing but what he had notice of by the deeds making out the title to the fee. In this respect it is just the same as where the trust to attend the inheritance is constructive or implied. Indeed, if the trust be declared to attend the freehold and inheritance as limited or settled by such a deed, or to protect the uses of such a settlement, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril. I look upon this to have been the ground of the mistake.

Secondly, it was argued that a term expressly assigned to attend the inheritance is so connected with it that it will go along with all the uses and interests devised out of that inheritance for a valuable consideration; that where a new conveyance is made of it for a valuable consideration the trust of the term will immediately follow it, and the trustee will become a trustee for the new use; that so it was here upon the first mortgage made to the plaintiff, Mrs. Willoughby, by the defendant, her son, and the surviving trustee, Skylling, could not alter the trust. I agree that it will be so against the grantor in that new conveyance of the inheritance, and his heirs and all persons claiming from him as volunteers, or with notice. So it is in all cases where the owner creates a new estate, use, or encumbrance, out of the inheritance, or a charge upon it, confesses a judgment or a statute staple, etc. The trust of an attendant term is affected with it in like manner as the inheritance is as against the grantor and his heirs, and the purchaser or encumbrancer will receive the benefit of it in this court. But when a new purchaser for a valuable consideration comes in without notice and with all the qualifications which I have before mentioned, and gets an assignment of the term, he comes in in a different degree, and, as he is innocent and has paid or given the value and has got the law with him, how can a court of equity take it from him, without contradicting all their rules? This subsequent purchaser, having no

notice, stands as against the prior purchaser or encumbrancer but in the common case.

Thirdly, it was objected further that this is to sever the trust of the term from the inheritance, and to leave the title of the inheritance to go one way and the trust of the term another way, and this was not in the power of the owner of the inheritance after his first conveyance, nor of the trustee, nor of both joining together. It is not necessary here to enter into the discussion of all the cases wherein a term once attendant upon the inheritance may be disannexed and be turned into a term in gross. It is certain that it may be done at any time by the absolute owner of the inheritance, and so it was admitted by Serjeant Maynard, in his argument of the *Duke of Norfolk's Case* (9) (3 Cas. in Ch. at p. 40), or it may be made to become a term in gross upon a contingency according to the resolution of that case. But here is no question of severing or disannexing, for the defendant Cripps, the second mortgagee of the fee, claims the term as attendant upon the inheritance in him. In this court, had he come in without notice, he must be considered as a purchaser of it, pro tanto, by his mortgage. He contracted for the security of the inheritance and paid his money for it, and, though he had the misfortune ignorantly and innocently to take a defective title to that inheritance, still it is the thing he bought and desires to protect. If this were otherwise, it would prevent every puisne mortgagee or purchaser who has got an assignment of an attendant term from making use of it in his defence. The argument was enforced by saying that it will put it in the power of a trustee of such an attendant term to prefer which of several encumbrancers he pleases by assigning it over, and that this he can no more do than a trustee to preserve contingent remainders can be allowed in this court to join to destroy them. But this reasoning answers itself, for I take it to be just upon the same foot as the case of a trustee to preserve contingent remainders. If such a trustee join in a conveyance to a purchaser for a valuable consideration and the purchaser has notice of that trust, the latter is affected with the trust and shall be decreed to reconvey the estate to the old uses. But if the purchaser comes in bona fide, and has no notice, he shall retain the estate, but the trustee shall make satisfaction for his breach of trust in destroying the contingent remainder [see *Mansell* v. *Mansell*, post p. 343]. It is just the same here. If the puisne purchaser or mortgagee has notice of the prior purchase or encumbrance, he shall not avail himself of the assignment of the term, but shall be decreed to reconvey or procure it to be reconveyed. If he had no notice he must retain it, but if the trustee, who joined in the assignment, had notice of such prior purchase or encumbrance, his conscience was affected by the trust. It was a breach of trust in him, and he ought to be decreed to make satisfaction. This, in my opinion, is what equity would demand.

To go a step further, see to what an extent this doctrine would go, if it were once admitted. It would make the assignment of such an attendant term to a purchaser's own trustees, named on his behalf, to protect him against nothing. The trust arising from the attendancy is to protect against mesne encumbrances, that is to say, mesne between the creation of the term and the assignment of it, or the use that is made of it. But if it be allowed that wherever there is a conveyance made, or a charge or encumbrance created upon the inheritance for a valuable consideration, that draws after it so much of the trust of the term (as it really does), and that, therefore, a puisne purchaser or mortgagee without notice taking an assignment of it, takes it still bound by the derivative trust, such puisne purchaser or mortgagee can never be safe, and whether he had notice or not is nothing to the purpose, for by this doctrine it is still open to all the prior encumbrances in the one case as well as in the other.

There is but one thing behind which deserves to be taken notice of under this head. It was said to have been the general rule among conveyancers in making marriage settlements or conveyances upon purchases, where they found an old term assigned upon express trust to attend the inheritance, not to disturb it or take any new assignment of it to trustees named by the purchaser, but to rely upon

A it as it is. I have inquired of a very learned and eminent conveyancer, and cannot find there has been any such general rule. If there had, I confess it would have been very material, as in my Lady Radnor's Case [*Lady Radnor* v. *Rotherham* (10)]. It is true that Mr. John Ward, of the Temple, who was considerable in that branch of business, has declared it to be his opinion and he took it to be so. But how far he practised so, non constat, and, if he did, it would not make a general
B rule, which is the point to be inquired after. To reduce it to reason, it must be taken with a distinction. Where an old term has been assigned upon an express trust to attend upon and protect the inheritance, as settled by such a deed, or the uses of such a settlement described or referred to particularly, as it sometimes happens, and the conveyancer is satisfied that those uses of the inheritance have never been barred till his new settlement or purchase is made, he may very safely
C rely upon it, because the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the cases of a purchase or mortgage where the title deeds always are, or ought to be, taken in, for, if he has the creation and the assignment of the term in his own hands, no use can be made of it against him. Such instances as these may account
D for the practice in many cases, but cannot constitute a general rule.

Much was said under the head of inconvenience, danger to marriage settlements, and to prior purchases fairly made, but the inconvenience which would arise, on the other hand, of breaking in upon the rule, that a purchaser for a valuable consideration, without notice, shall not be hurt in equity, or that a court of equity shall never take away the benefit of the law from him, will balance all those argu-
E ments and be found to outweigh them. This rule in equity bears an analogy and conformity to several rules of the common law relating to collateral warranties, non-claims, and descents, cast, which are only the wise inventions and decisions of the law to protect and quiet possessions.

From this reasoning, I am clearly of opinion, on the first point, that the defendant Cripps, the puisne mortgagee, would have been entitled in a court of equity
F to the benefit of this trust term to protect his mortgage, both against the marriage settlement and the plaintiff Jane's first mortgage, if he had no notice of either. I may seem to stand in need of some excuse for being so long upon this head, since at last my decree in this cause will not turn upon it, but merely on the second point. But it had been so much laboured at the Bar and appeared in itself to be of so great importance to titles that I thought it necessary that my opinion upon
G it at least should be known, and that the court by their silence might not be understood to countenance this new distinction which had been set up.

The second question is a particular one, and arises upon the special circumstances of this case—whether the defendant Cripps, having full notice of the marriage settlement, the jointure, and the portions, and consequently not being entitled to the entire absolute benefit of the legal estate of the old term, can be preferred
H to the plaintiff Mrs. Willoughby even as to her mortgage, or must come in only according to his priority in order of time. On this point I am of opinion that he must come in only according to his priority in order of time. My reasons are two.

First, he has not the legal estate of the term in himself, nor has he as this case is circumstanced, the best or preferable right to call for that legal estate. Secondly, I cannot say that he took his mortgage clearly bona fide in this case. Consider
I how the right would have stood as between the plaintiff Mrs. Willoughby's mortgage and the defendant Cripp's mortgage if there had been no assignment of the old term to a new trustee for Cripps, but the legal estate had remained in Skylling, the surviving trustee in the first assignment, to attend the inheritance. In that case it would have been most plain that Mrs. Willoughby's mortgage should have been preferred. Wherever the legal estate is standing out, either in a prior encumbrancer or in such a trustee as against whom the puisne encumbrancer has not the best right to call for the legal estate, the whole title and consideration is in equity, and then the general maxim must take place, qui prior est tempore potior

est jure. This is the last point expressly determined by Sir Joseph Jekyll, M.R., in *Brace* v. *Duchess of Marlborough* (11). His words are (2 P.Wms. at p. 495):

> "In this case it appears that a puisne encumbrancer bought in a prior mortgage, in order to unite the same to the puisne encumbrance; but it being proved that there was a mortgage prior to that, the court clearly held that the puisne encumbrancer, where he had not gotten a legal estate, or where the legal estate was vested in a trustee, could then make no advantage of his mortgage, but in all cases where the legal estate is standing out the several encumbrances must be paid according to their priority."

Those words, "in all cases where the legal estate is standing out," must be understood subject to Lord Cowper's qualification and distinction, so standing out as that the puisne encumbrancer has not acquired the better or preferable right to call for that legal estate. This he has plainly not done here, for, the defendant Cripps having full notice of the marriage settlement before he took his mortgage, the plaintiff, Mrs. Willoughby, has the better and preferable right even as against the defendant Alexander Boote, the new trustee, to call for the legal estate of the old term to protect her jointure. She might on equitable grounds demand it to be assigned to a new trustee for her, and when that was done, I think she might protect her mortgage by it. This brings the whole to be an equity, and subjects the case to the rule qui prior est tempore potior est jure. She might come for an injunction to restrain Boote from recovering the possession from her by ejectment, and compel the defendant Cripps to redeem her in respect of the arrears of her annuity, and then he must redeem her entirely. This is not so strong as the case of tacking a third encumbrance to a first in order to squeeze out a second, because it goes only in support and preservation of the plaintiff's actual priority, her original, prior, equitable right, which she acquired by having the first mortgage.

I think this point is materially corroborated against the defendant by my second reason, which is that he did not take his mortgage clearly bona fide in this case. It appears plainly to me that he aimed at gaining an unfair advantage in the manner of taking his security. He had full notice of the marriage settlement, the jointure of £350 per annum, and the younger children's portions. He knew all these to be prior encumbrances on the estate, and yet in contradiction to this, and with his eyes open, he took an express covenant in his mortgage deed that the premises were free from all encumbrances, except one indenture of assignment of the whole term to the defendant Boote, and the said term and the mesne assignments thereof in the said last assignment mentioned. This was plainly intended to conceal that full notice which he had of the marriage settlement, and in consequence thereof he has not admitted that notice by his answer in this cause, but has put the plaintiff upon the proof of it, and now it comes out by the proofs in this strong light that it appears to have been fully stated in the case laid before his own counsel previous to the lending of his money. This is against conscience, and is a badge of an indirect and collusive intention.

For these reasons I am of opinion that the defendant Cripps wants, and stands divested of, two ingredients necessary to entitle himself in equity to the protection of this whole term against the plaintiff, that is to say, clear bona fides, and the first and best right to call for the legal estate, and, therefore, that he can come in only according to the order of time, which is posterior to the jointure, the portions, and the plaintiff's mortgage.

Decreed that proper accounts be taken of principal and interest; a sale of the estate; application of the money arising by the sale; the mortgage to the plaintiff to be preferred to the mortgage to the defendant Cripps.

A

MANSELL *v.* MANSELL AND OTHERS

[Lord Chancellor's Court (Lord King, L.C., assisted by Lord Raymond,] C.J.(K.B.) and Reynolds, C.B.), Michaelmas Term, 1732]

[Reported Cas. temp. Talb. 252; 2 P.Wms. 678; 2 Barn.K.B. 187; 2 Eq. Cas. Abr. 748; 24 E.R. 913]

B

Trustee—Breach of trust—Liability—Trustees for preserving contingent remainders—Joining in destroying remainders—Reinstatement of tenant in tail.

Trustees for preserving contingent remainders who join before the birth of a son of the settlor in destroying them are guilty of a breach of trust, and the tenant in tail deprived thereby is entitled to an order requiring them to join in making such an estate to him as he would have been entitled to under the settlement if the contingent remainders had not been destroyed.

C

Sale of Land—Trust—Conveyance to purchaser with notice of trust—Purchaser bound by trust—Conveyance to purchaser without notice for valuable consideration—Discharge of lands from trust—Remedy of cestui que trust against trustees.

D

Where premises subject to a trust are conveyed to a purchaser without notice of the trust and for valuable consideration the purchaser is entitled to have the lands discharged from the trust, and the cestui que trust who is injured by the breach of trust has his remedy against the trustees who will be decreed to purchase land with their own money equal in value to the land sold and to hold it on the same trusts and limitations as they held the land sold by them. But if the purchaser had notice of the trust, that notice would have made him subject to the trust.

E

Notes. Considered: *Savage* v. *Taylor* (1736), Cas. temp. Talb. 234. Referred to: *Symance* v. *Tattam* (1737), 1 Atk. 613; *Garth* v. *Cotton* (1753), post p. 392, *Lanfielde d. Banton* v. *Hodges* (1773), Lofft., 230; *Barnard* v. *Large* (1780), Amb. 773; *Moody* v. *Walters* (1809), 16 Ves. 283.

F

As to liability for breach of trust, see 38 Halsbury's Laws (3rd Edn.) 1040 et seq., and as to purchase of land subject to a trust, see ibid., vol. 34, 303, 304. For cases see 47 Digest (Repl.) 471 et seq.; 40 Digest (Repl.) 159 et seq.

G

Cases referred to:

(1) *Duke of Norfolk's Case*, *Howard* v. *Duke of Norfolk* (1683), 3 Cas. in Ch. 1; 2 Swan. 454; Freem. Ch. 72, 80, Poll 223; 2 Rep. Ch. 229; 22 E.R. 931, L.C.; reversed sub nom. *Duke of Norfolk* v. *Howard*, 1 Vern. 163; reversed sub nom. *Howard* v. *Duke of Norfolk* (1685), 14 Lords Journals, 49, H.L.; 37 Digest (Repl.) 78, *187*.

H

(2) *Pye* v. *Gorge* (1710), 1 P.Wms. 128; 2 Salk. 680; Prec. Ch. 308; affirmed sub nom. *Gorges* v. *Pye* (1712), 7 Bro. Parl. Cas. 221; 47 Digest (Repl.) 468, *4200*.

(3) *Englefeild* v. *Englefeild* (1686), 1 Vern. 443.

(4) *Elie* v. *Osborne* (1717), 2 Vern. 754; 23 E.R. 1093; sub nom. *Else* v. *Osborn*, 1 P.Wms. 387, L.C.; 47 Digest (Repl.) 468, *4200*.

I

(5) *Winnington* v. *Foley* (1719), 1 P.Wms. 536.

(6) *Platt* v. *Sprigg* (1693), 2 Vern. 303.

Bill by the plaintiff, Sir Edward Mansell, against Rawleigh Mansell and others for the enforcement of the provisions of the will of one Edward Vaughan.

Edward Vaughan, being seised in fee of lands in Carmarthenshire of £1,630 per annum, made his will, dated Nov. 30, 1683, and devised the premises to trustees (Sir Edward Mansell and Arthur Mansell) and their heirs to the use of his sister Dorothy Loyd, widow, for her life, remainder to the trustees and their heirs during the life of Dorothy, in trust to preserve contingent remainders, remainder to

the use of the sons of Dorothy in tail male successively, remainder to the use of the testator's cousin Edward Mansell in fee. The testator died without issue, and Dorothy Loyd, the devisee for life, married Sir Edward Mansell, the plaintiff's father. Afterwards Sir Edward Mansell and Dorothy his wife, together with Edward Mansell, the remainderman in fee, joined in a feoffment to trustees to the use of Sir Edward Mansell and his heirs, and covenanted by the same indenture to levy a fine at the next grand sessions to be held for the county of Carmarthen to the same trustees and to the same uses. The trustees for preserving the contingent remainders in the will, by indentures of lease and release dated July 23 and 24, 1686, conveyed the premises to Sir Edward Mansell in fee, his wife at that time being enceinte with a son. On Aug. 7 following, Dame Dorothy had issue by Sir Edward Mansell, a son, the plaintiff now Sir Edward Mansell. Later she had several other children. Sir Edward Mansell made his will, and, being seised in fee of divers other lands besides the Vaughan estate, devised all his lands and tenements in general words to his son, the plaintiff, for life, remainder to his sons in tail male successively, remainder to his second son by Dorothy for life, with remainder to his sons in tail male successively. He died leaving several sons. Dame Dorothy his wife also died. The plaintiff, the eldest son of the marriage, being barred at law of his remainder in tail by the joining of the trustees before his birth, brought his bill to have the benefit of the will of his uncle Edward Vaughan, whereby the premises were devised to his mother Dorothy for life only, remainder to trustees during her life to preserve contingent remainders, with remainder to her first son (the plaintiff) in tail, and that the plaintiff might have the benefit of the settlement and be reinstated in the premises as if there had been no breach of trust.

This point, whether trustees for preserving contingent remainders joining before the birth of a son in destroying them, were guilty of a breach of trust, being a matter of great consequence, was reserved for the opinion of the court, who now, with the concurrence of Lord Raymond, C.J., of the King's Bench and Reynolds, C.B., decreed the same to be a breach of trust in them. It was resolved

(i) That the feoffment and fine by Sir Edward Mansell and Dorothy his wife did not destroy the contingent remainders to the sons of Dorothy, but that the right to the freehold in the trustees did support them.

(ii) That when the trustees joined in the lease and release to Sir Edward Mansell (the plaintiff's father) and his heirs, this destroyed the contingent remainders.

(iii) That the joining of the trustees to destroy such remainders was a plain breach of trust. Although this had not been before judicially determined, yet it seemed to the court, in common sense, reason and justice, to be capable of no other construction, for when trustees are appointed to preserve an estate in a family, and for no other purpose, and they, instead of preserving it, do a wilful act with an intent and in order to destroy it, how can this be otherwise than a plain breach of trust, or how can it be rendered clearer than by barely putting the case? Should the court hold it no breach of trust or pass it by with impunity, it would be making proclamation that the trustees in all the great settlements in England were at liberty to destroy what they had been entrusted only to preserve. Indeed, where an estate is limited to A. for life, remainder to his sons in tail, though it be a plain wrong and tort in him to do any act which will destroy those contingent remainders before the birth of a son, notwithstanding his legal power of doing so, yet as in this case there is no trustee, there can be no trust, nor consequently any breach of trust, and, therefore, a court of equity may have no cognisance of such a case, nor handle for relief, the matter being left purely to the common law. But to prevent this inconvenience the remedy of appointing trustees has been invented on purpose to disable the tenant for life from doing such injury to his issue, which is not a very old invention. As it was a tort in the tenant for life (where there were no trustees) to destroy contingent remainders, so must it more plainly be one in trustees to join in the destruction of them, being contrary to their trust, upon which account only is such act of theirs punishable in a court of equity.

A As to the remedy, had the premises been conveyed to one without notice and for a valuable consideration, the purchaser must have held the lands discharged of the trust, and the son of the marriage who was injured by the breach of trust must have taken his remedy against the trustees only, who would have been decreed to purchase lands with their own money equal in value to the lands sold, and to hold them upon the same trusts and limitations as they held those sold by B them. But even in the case of a purchase, if the purchaser had notice of the trust which the trustees were subject to as annexed to their estate, such notice would have made him liable to the same trust, so if there had been a voluntary conveyance made of this estate, though without notice, the voluntary grantee would have stood in the place of the grantors and have been liable to the trust in the same manner as the trustees themselves were. But in the present case it is much C stronger, for here was not only notice of the trust, but the conveyance itself was voluntary and made to Sir Edward Mansell, the plaintiff's father, who was the tenant for life and was himself particeps criminis, nay one for whose sake and interest all this had been done. So that the lands conveyed by these trustees must now remain liable to the same trusts as they were when the trustees joined in the conveyance to Sir Edward Mansell.

D As to what has been mentioned from Pollexfen's Rep. 250 [*Duke of Norfolk's Case* (1)], "that trustees [for preserving contingent remainders] were never punished in equity when they broke their trusts [and destroyed them]," that was said by Mr. Pollexfen when of counsel and arguendo only. It is observable that still this saying admits it to be a breach of trust, which, of course, seems punishable in a court of equity. However, to outweigh this, there is *Pye* v. *Gorge* (2), E reported in 2 Salk. 680, which is of greater authority than the dictum of Pollexfen as counsel, it being there declared by Lord Harcourt, L.C.) though not decreed as the book says), that trustees for preserving contingent remainders are punishable as for a breach of trust, if they join in a conveyance to destroy them. As for *Englefeild* v. *Englefeild* (3), 1 Vern. 443, 446, where there was a destruction of a contingent remainder, that was determined only upon the fraud appearing therein, F and, besides, there being no trustees, there could be no trust nor consequently any breach thereof.

It has been contended that, though in all settlements on marriage or for other valuable consideration it would be a breach of trust in the trustees to join in destroying contingent remainders, yet it is otherwise in case of remainders created by a will or other voluntary settlement, but in reality it is as much a breach of G trust in one case as in the other. It cannot be denied that, if I make a voluntary conveyance in trust for myself and my trustees sell the estate or convey it to another for any valuable consideration, without notice, I have, notwithstanding, a remedy against them for this breach of trust. Whether they do it by a voluntary conveyance or not is not material, for still every trustee ought to be faithful to his trust.

H With regard to *Elie* v. *Osborne* (4), 2 Vern. 754, where the marriage settlement was to the use of the husband for ninety-nine years if he so long lived, remainder to trustees during the life of the husband to preserve contingent remainders, remainder to the wife for her jointure, remainder to the heirs of the body of the husband by the wife, remainder to the right heirs of the husband, which settlement was made by the husband, and he, having two sons, joined with his wife, his eldest I son, and the trustees in a fine, upon which, it being objected that this was a breach of trust in the trustees, the court is said to have held it was not, for that the first son was in equity as tenant in tail and his having joined with the trustees made it no breach of trust. The report of this case is not satisfactory. It cannot be said that the eldest son, where the remainder is limited to the heirs of the body of the husband by the wife, can, during the life of the husband, have any estate vested in him in equity more than he has at law, for nemo est hæres viventis. In *Winnington* v. *Foley* (5), where lands were settled on marriage to the husband for ninety-nine years if he should so long live, remainder to trustees to preserve

contingent remainders, remainder to the sons of the marriage in tail male successively, remainder to the sons by any other marriage in tail male, the husband had a son, the wife died, and, the son being about an advantageous match, the surviving trustee, apprehending himself to be a trustee for all the sons, would not join in a recovery without a decree, which was accordingly had, directing him to join therein. One reason of that decree was for that this, by making the son tenant for life instead of tenant in tail, would be a means of preserving the estate the longer in the family, but LORD MACCLESFIELD, L.C., observed that, the wife of Mr. Winnington the father being dead, there could be no more contingent remainders within the consideration of the marriage settlement, and, therefore, it was reasonable to decree the trustee to join. But in the present case there is none of these circumstances; no decree for the trustees to join could possibly have been obtained here.

With regard to *Pye* v. *Gorge* (2) (mentioned above), a third person settled lands on the husband for ninety-nine years if he should so long live, remainder to trustees and their heirs during the life of the husband to support contingent remainders, remainder to the sons of the husband by the marriage, remainder to the right heirs of the husband, the husband, wife, and trustees joined in a sale of the premises, after which, the husband and wife dying without ever having had issue, a remote heir brought his bill to be relieved against this conveyance as a breach of trust. The bill was dismissed for that such remote heir was not intended to be provided for by that settlement. To bring that determination to this case it must be supposed that, if a son had afterwards been born, the Lord Chancellor would not have declared it a breach of trust, whereas his Lordship did here actually declare it to be a dangerous experiment for trustees in any case to destroy remainders which they were appointed by the settlement to preserve.

In *Platt* v. *Sprigg* (6), a man, having mortgaged and encumbered his estate, settled it on himself for life, remainder to trustees during his life to preserve contingent remainders, remainder to his wife for life, remainder to their sons in tail. Having no issue he articled to sell to one who brought his bill for a specific execution of the articles and to compel the trustees to join in conveyances. It appearing that the mortgagee threatened to enter and foreclose, and the wife of the vendor consenting in court to a sale, the trustees were decreed to join. It is to be observed (i) that there did not appear in this case ever to have been issue; (ii) that the mortgagee might have swallowed up all by his mortgage; and (iii) that (as was done in *Winnington* v. *Foley* (5) the trustees were decreed to join, whereas no such circumstances are found in the present case. Besides where the husband and wife were getting on in years, had no prospect of issue, and the estate was in debt, the courts may, perhaps, have formerly gone so far as to decree trustees to join in a sale, which, however, was going too far. The present case appears with a quite different aspect, the married couple young, the wife enceinte when the trustees joined to bar the remainders, and the conveyance by the trustees made on purpose to bar this child then so near its birth, so that were there no precedent for relief, yet the reason and justice of the case is so strong that unless precedents could be produced in the very point against it, the act of the trustees ought to be deemed a breach of trust, and punished as such. Therefore, the land in the hands of the voluntary grantee must be affected with, and liable to, the trust.

Let all parties join in making such an estate to the plaintiff, as he would have been entitled to under Mr. Vaughan's will, if these contingent remainders had not been destroyed, that is, an estate in tail male.

Order accordingly.

KNIGHT'S CASE

[Court of Common Pleas and Court of Exchequer Chamber (Anderson, C.J., Peryam, Rodes and Windham, JJ., and other judges), Michaelmas Term, 1588]

[Reported 5 Co. Rep. 54 b; 1 And. 173; Goulsb. 15; 3 Leon. 124; Moore, K.B. 199; 77 E.R. 137]

Landlord and Tenant—Rent—Several rents reserved for different parts of demised land—Limitation of landlord's right to distrain.

While a single rent reserved in respect of the whole of the demised land becomes due out of every part of the land and any part of the land can be distrained on in respect of arrears, in one lease several yearly rents for different parts of the land may be reserved. In such case each rent is incident only to that part of the land on which it is charged, and on that part only can the landlord distrain.

Notes. Referred to: *Stukeley* v. *Butler* (1615), Hob. 168; *Havergil* v. *Hare* (1616), 3 Bulst. 250; *Field* v. *Boethsby* (1658), 2 Sid. 137; *Ward* v. *Everet* (1699), 1 Ld. Raym. 422.

As to reservation of rent, see 23 Halsbury's Laws 536–543. For cases see 31 Digest (Repl.) 241–251.

Case referred to:

(1) *Winter's Case* (1572), 3 Dyer, 308 b; 73 E.R. 697; sub nom. *Wynter's Case*, 1 Co. Inst. 215 a; 31 Digest (Repl.) 475, *6006*.

Action of trespass brought by the plaintiff, Knight, against the defendant, Breech. In 1537 the prior of St. John's of Jerusalem, made a lease by deed indented with the assent of his convent under their common seal, of divers houses in Clerkenwell in the county of Middlesex for years yet enduring, yielding the yearly rent of £5 10s. 11d. at four feasts in the year, usual in the city of London—for one house £3 0s. 11d., for another 20s., and for the other houses several rents making up the residue of the rent of £5 10s. 11d. with condition that, if the said rent be behind in part or in all at any of the said feasts, then the prior and his successors should re-enter. Afterwards the priory and all the possessions thereof came to Henry VIII by surrender of the prior and convent, and in 1544 the King by his letters patent under his Great Seal granted one of the houses (for which 20s. of the rent was by the said lease reserved) to the lessee and another in fee. Afterwards the lessee died. In 1583 it was found by inquisition, by force of a commission under the Exchequer seal, that 37s. 5d., parcel of the rent of £5 10s. 11d. reserved by the demise, was in arrear at the feast of St. Michael for a quarter of a year then last past, and that the feast of St. Michael was one of the usual feasts of payment in London. Before the commission returned and before any entry or seizure by her, Queen Elizabeth by her letters patent under the Great Seal, granted the residue of the houses to the one in fee who made the lease to the plaintiff, Knight, on whom Breech, the defendant, the assignee of the executor of the first lessee entered, and against whom Knight, the plaintiff, brought an action of trespass.

SIR EDWARD COKE, in his report, stated: This notable case was often argued at the Bar in the Common Pleas, and afterwards openly by the justices [Anderson, C.J., Peryam, Rodes and Windham, JJ.] at two several days, and because the court was divided in opinion, the case was argued in the Exchequer Chamber before all the justices of England. After argument at Bar and divers conferences had among the justices at Serjeants' Inn, it was adjudged for the plaintiff, and these points were resolved.

First, it was one entire lease, and consisted on six unities: (i) The demise is made by one word of demise. (ii) To one lessee. (iii) To have one beginning. (iv) One term of years. (v) One determination of it. (vi) One reservation of rent in gross at the first, and the (videlicet) afterwards does not make a severance

of it, as this case is, but is rather a several declaration of the several values of each parcel, by which it appears how and for what rates the whole rent of £5 10s. 11d. is reserved.

But it was resolved that on one lease several yearly rents by apt words might be reserved, for the reservation of the rent is not of the substance of the lease, for a lease may consist without any reservation, either for part or for the whole. Therefore, if a man makes a lease to B. of the manors of Dale, Sale and Down, to have and to hold to him the said manors for 21 years, rendering yearly out of the manor of Dale £10, in that case the manor of Dale only is charged with the said rent, the manors of Sale and Down are not charged with it, and the rent is incident to the reversion of the manor of Dale only. If in that case the lessor grants over the reversion of the manors of Sale and Down, yet the whole rent of £10 remains with the lessor, and the lessor or his lessee cannot distrain for this rent in the manors of Sale and Down. In the same case the lessor might have reserved a rent of £10 out of the manor of Dale during five years, and £10 out of the manor of Sale during ten years, and £16 out of the manor of Down to commence ten years after, and one on a condition precedent, another on a condition subsequent, and the third absolutely, to be paid at several days and places. In those cases without question the rents are several, and for the rent of the one the lessor cannot distrain in any of the other, and a surrender of one manor will not extinguish the rents for the others. Therewith agree *Winter's Case* (1) by three justices; Y.B. 17 Edw. 3, 75 B.; 17 Ass. pl. 10, and Y.B. 9 Edw. 3, 12, and such construction agrees also with the true intent of the parties which is always to be observed when it may by reasonable construction consist with the rule and reason of the law.

But in the case at Bar it was resolved that the rent was entire, because first the lessor reserves the yearly rent (in the singular number) of £5 10s. 11d. Afterwards when the lessor comes to his condition for payment of the rent, the condition is also in the singular number, if the said rent of £5 10s. 11d. be behind in part or in all, so that it agrees with the words of the indenture (which import the intent of the parties) that in this case it should be one entire rent. If it should be several rents, then a question might be made of the validity of the condition, which extends to the said rent, etc., in the singular number, sed benignæ faciendæ sunt interpretationes chartarum propter simplicitatem laicorum ut res magis valeat quam pereat. By this construction all the parts of the said indenture well agree with themselves, and with the law also. The difference between this case and *Winter's Case* (1) is because there the reservations are several, and here (on consideration of the whole indenture) entire.

Secondly, it was resolved that, admitting they had been several rents, yet forasmuch as the condition was entire, giving one entire entry into the whole for default of payment of any part, by the severance of any part of the reversion (if it was in the case of a common person) the whole condition would be destroyed. Therewith agrees the judgment in *Winter's Case* (1).

[The other resolutions of the court dealt with matters which do not now call for report].

A

BISHOP OF ST. DAVID'S *v.* LUCY

[Court of King's Bench (Sir John Holt, C.J., Rokeby, Turton and Gould, JJ.), Easter Term, 1699]

B [Reported 12 Mod. Rep. 237; Carth. 484; Holt, K.B. 651; 1 Ld. Raym. 447; 1 Salk. 134; 3 Salk. 90; 5 Mod. Rep. 433; Brod. & F. 332; 91 E.R. 126]

Ecclesiastical Law—Offence—Bishop—Trial by archbishop or vicar-general—Competency.

C The Archbishop of Canterbury has provincial jurisdiction over all his bishops which he may exercise in what place in the province it shall please him. The power of the vicar-general of an archbishop in a province corresponds with that of the chancellor of a bishop in a diocese. A citation to a bishop to appear before the archbishop or his vicar-general in the hall of the archbishop's official residence to answer charges of simony, **held**, to be good.

Ecclesiastical Law—Offence—Simony—Contract by bishop for sale of curacy—Deprivation.

D Where a bishop, being the incumbent of a church, covenanted that he would make W.B. his curate and resign to him his rectory in consideration of the payment to him of two hundred guineas,

Held: the contract was simoniacal and constituted the offence of simony, for which the bishop was liable to a sentence of deprivation by an ecclesiastical E court.

Notes. Considered: *Re Dean of York* (1841), 2 Q.B. 1. Followed: *Read* v. *Bishop of Lincoln* (1889), 14 P.D. 88. Referred to: *McGeath* v. *Geraghty* (1866), 15 W.R. 127; *Boyd* v. *Phillpotts* (1874), L.R. 4 A. & E. 297; *Combe* v. *De la Bere* (1881), 6 P.D. 157; *Read* v. *Archbishop of Canterbury* (1888), 4 T.L.R. 741; *R.* v. *Tristram*, [1902] 1 K.B. 816.

F As to simony, see 13 Halsbury's Laws (3rd Edn.) 216, 286, 287. For cases see 19 Digest (Repl.) 417–422.

Cases referred to:

(1) *Savage's Case* (1516), Keilw. 194 a; 72 E.R. 372.

(2) *Caudrey's Case* (1591), 5 Co. Rep. 1 a; 77 E.R. 1; sub nom. *Cawdry* v. *Atton*, Poph. 59; 19 Digest (Repl.) 242, *16*.

G **Suit** promoted before the Archbishop of Canterbury against the Bishop of St. David's upon several articles for simony and other offences. To these articles Dr. Thomas Watson, the Bishop of St. David's put in his answer. Proof being offered on the part of the promoter the bishop appealed to commissioners delegates, and pending the appeal he moved in the King's Bench for a prohibition upon a suggestion that the matters contained in the articles were of temporal conusance. H

Sir Bartholomew Shower, for the prohibition: It does not appear that the Bishop of St. David's was cited to appear in any court whereof the law takes notice, for the citation is that he should appear before the Archbishop of Canterbury or his vicar-general in the hall of Lambeth House, to answer the charges made against him, which is not a court whereof the law takes notice. The archbishop has the I same power over his suffragan bishops as every bishop has over the clergy of his diocese, but no bishop can cite the clergy before himself but in his court. Therefore, the citation ought to have been here, to appear in the Court of Arches, or some other court of the archbishop.

Wright, King's Serjeant, submitted that without doubt the archbishop had jurisdiction over all the clergy, as well bishops as others within his province. For that he cited the case of Dr. Wood, Bishop of Litchfield and Coventry, who in 1687 was suspended by Archbishop Sancroft for dilapidations, the profits of the bishopric being sequestered and the episcopal palace rebuilt out of them, and he died under

that sequestration. He cited also the case of Marmaduke Middleton, Bishop of St. David's, who on May 8, 1582, was suspended by the high commissioners for misapplication and abuse of the charity of Brecknock (which is one of the crimes of which this bishop is accused): WHITGIFT'S REGISTER, 177. Though that suspension was made by the High Commission Court, yet that will make no difference, because the High Commissioners have not any new jurisdiction, or one greater, than the archbishop, by s. 18 of the Act of Supremacy, 1558 [repealed by Criminal Justice Act, 1948].

SIR JOHN HOLT, C.J., said that the admitting of that point of the jurisdiction to be disputed would be to admit the disputing of fundamentals which the counsel of the other side attempt to subvert, not duly considering the respect due to the primate and metropolitan of England, for (HIS LORDSHIP continued) the Archbishop of Canterbury has without doubt provincial jurisdiction over all his suffragan bishops, which he may exercise in what place in the province it shall please him. It is not material to be in the Court of Arches, no more than any other place, for the Arches is only a peculiar, consisting of twelve parishes in London, except from the Bishop of London, where the Archbishop of Canterbury exercises his metropolitical jurisdiction. But he is not confined to exercise it there. The citation here is to appear before the archbishop himself, or his vicar-general, who is an officer of whom the law takes notice, for the vicar-general in the province is of the same nature as the chancellor in every particular diocese, and the Dean of the Arches is the vicar-general of the archbishop in all the province.

Then counsel for the Bishop of St. David's urged that the matters contained in the articles exhibited against the bishop before the archbishop were of temporal conusance, and not conusable before the archbishop. The first of the articles was that the Bishop of St. David's, being incumbent of the church of Borough Green, Cambridge, covenanted with William Brookes for 200 guineas to make him his curate and to resign to him his rectory when he should be requested to do it.

Sir William Williams, *Sir Thomas Powys*, *Sir Bartholomew Shower*, and *Northey* argued: (i) This article imports only contract made by the bishop as incumbent of the church of Borough Green and not as Bishop of St. David's, and, therefore, admitting that fact to be simony, they ought not to bring it per saltum before the archbishop, but it should be begun in the court of the Bishop of Ely, who has Cambridgeshire in his diocese. This method will deprive the bishop of his appeal. (ii) This fact amounts only to a temporal contract, which is not of spiritual conusance. No matter is alleged in this article to be executed which amounts to simony, for he only took money to make a curate which is lawful and the covenant to resign was never executed, so that it could not be simony within the Simony Act, 1588, because there was no resignation in pursuance of the covenant. And it is not simony within any of the canons which are in force in England. Besides, since the Act of 1588 settles simony, it is a question how far the King's Bench will permit the spiritual courts to proceed and extend their notion of simony.

Against which it was argued by the *Attorney-General* (*Sir Thomas Trevor*), *Serjeant Wright* and *Cheshyre* that, as to the first objection, if a bishop make a simoniacal contract, it is a personal offence in him contrary to his office of bishop, and is punishable by the metropolitan by the ecclesiastical censures. These proceedings are for an offence committed contrary to the duty as being a bishop.

Of this opinion was the whole court. As to the second objection, they said that, though this was a contract, yet it was a simoniacal contract, and then it would be examinable in the spiritual court, not whether the contract ought to be performed or not, but to punish the party by ecclesiastical censures. It is without doubt simony, for it is a contract to resign a benefice for £200 for by the spiritual law the buying of chrism [consecrated oil] etc., or any other thing quae ad spiritualia spectat, is simony. The common law takes no notice of any simony but that which the statute mentions, which statute has not defined simony in such manner as to say what shall be simony and what not by the spiritual law. This

fact, if it be simony, is conusable in the spiritual court as before the Act of 1558. If it is not simony, and the archbishop adjudges it simony, that will be good cause of appeal, but not of prohibition [see now 11 HALSBURY'S LAWS (3rd Edn.) 121, note (k)]. That simony was of ecclesiastical conusance before the statute is without doubt: 2 CANON OF COUNCIL OF CHALCEDON, GEN. CONC. 397. If a bishop or churchman commits simony, he shall be degraded; if a layman, he shall be anathematised: 2 GEN. CONC. 110. The taking of money for orders or institution is simony by the Council of Chalcedon. By the 135th canon of the year 1603, it is simony to take anything, where the usage does not warrant it, and it is simony to take more than the usage warrants as more for visitations than the usage warrants. Quod fuit concessum per totam curiam .

SIR JOHN HOLT, C.J.—Simony is an offence by the canon law, of which the common law does not take notice to punish it, for there is not a word of simony in the statute of Elizabeth, but of buying and selling. It would be very unjust if ecclesiastical persons might offend against the ecclesiastical duty in such instances of which the common law cannot take notice to punish them, and yet the King's Bench should prohibit the spiritual court from inflicting punishment according to their law. The clergy are subject to a law different from that to which laymen are subject, for they are subject to obey the canons. The convocation of the clergy may make laws to bind all the clerks, but not the lay people. If the clergy do not conform themselves, it will be cause of deprivation. Resolved by all the judges of England. And by such authority were the canons of the year 1603 made, which make simony so great an offence, and the said canons have been always received, though some question has been made of the canons in 1640. Many of the ancient canons are as old as any law that we have at this time.

Counsel for the bishop argued that another article against him was that he had ordained a man under age. The bishop made his defence and said that churchwardens had certified to him that he was of full age, to which the promoter answered that that certificate was forged, for the churchwardens did not certify, and one of them could not write. So this article imports forgery, and is, therefore, examinable and punishable at common law. Since the Act of Uniformity has altered the law, they ought to proceed upon the statute for ordaining under age.

The court said that the distinction which would answer almost all these objections was that, as to that which relates to the office of bishop and is against his duty as a bishop, the spiritual court may proceed against him to deprive him, but not to punish him as for a temporal offence: see *Savage's Case* (1) and *Caudrey's Case* (2), where upon a special verdict found, it appeared that Caudrey was deprived by the High Commissioners for preaching against the Common Prayer, and, though there was other punishment appointed by the statute and not deprivation until the second offence, yet it was held that they might proceed by their own law and deprive him, it being against the duty of his office as a minister and they having power to purge their body of all scandalous members.

STAPILTON *v.* STAPILTON AND OTHERS

[Lord Chancellor's Court (Lord Hardwicke, L.C.), August 2, 1739]

[Reported 1 Atk. 2; 26 E.R. 1]

Family Arrangement—Transaction regarded with favour by court—Saving honour of family—Reasonableness.

Where an agreement is entered into to save the honour of a family, and is a reasonable one, a court of equity should, if it is possible, decree a performance of it. The court will be glad to lay hold of any just ground to carry the agreement into execution and establish the peace of a family.

Contract—Consideration—Settlement of supposition of right or doubtful right—Prevalence of agreement if right found to be in other party.

Per Lord Hardwicke, L.C.: An agreement entered into upon the supposition of a right or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other, and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement.

Notes. Considered: *Houghton* v. *Tate* (1829), 3 Y. & J. 486. Referred to: *Stockley* v. *Stockley*, [1803–13] All E.R.Rep. 543; *Dunnage* v. *White* (1818), 1 Swan. 137; *Gordon* v. *Gordon* (1821), 3 Swan. 400; *Stewart* v. *Stewart* (1839), 6 Cl. & Fin. 911; *Cooke* v. *Turner* (1845), 14 Sim. 493; *Cooke* v. *Turner* (1846), 15 M. & W. 727; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Dimsdale* v. *Dimsdale* (1856), 3 Drew. 556; *Head* v. *Godlee*, *Reynolds* v. *Godlee* (1859), John. 536; *Williams* v. *Williams* (1865), 2 Drew. & Sm. 378; *Fane* v. *Fane* (1875), L.R. 20 Eq. 698.

As to family arrangements, see 17 Halsbury's Laws (3rd Edn.) 223 et seq.; and as to consideration for a contract, see ibid., vol. 8, pp. 113–121. For cases see 24 Digest (Repl.) 1122 et seq.; 12 Digest (Repl.) 196 et seq.

Case referred to:

(1) *Cann* v. *Cann* (1721), 1 P.Wms. 723; 24 E.R. 586, L.C.; 35 Digest (Repl.) 101, *50*.

Bill to establish title to property and for an account.

By a deed dated Aug. 21, 1661, Philip Stapilton became tenant of premises for 99 years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs. Philip having two sons, Henry and Philip, they, by deeds of lease and release dated Sept. 9 and 10, 1724, reciting that for settling and perpetuating all manors in the name and blood of the Stapiltons, and for making provision for the two sons, for preventing disputes and controversies that might possibly arise between the two sons or any other person claiming an interest in all or any of the estates thereinafter mentioned, for barring all estates tail, for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5s., released and confirmed to Thompson and Fairfax all those manors, to have and to hold to them, their heirs and assigns, to the use (as to part) of Philip, the father, his heirs and assigns for ever, and as to another part to the use of Philip, the father, for life, remainder to Henry, the son, for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip, the son, for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip, the son in tail, remainder to the right heirs of Philip, the father. As to the remaining part, to the use of Philip, the father, for life, with like limitations in the first place to Philip, the son, and his issue, and then to Henry and his issue, remainder in fee to the father. There were covenants to

A suffer a recovery within twelve months, and likewise for further assurances. To these deeds the heir of the surviving trustee in the deed in 1661 was not a party. By deeds of lease and release dated Sept. 28 and 29, 1724, to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons made Thompson and Fairfax tenants to the præcipe in order to suffer a recovery for the purposes mentioned in the deeds of Sept. 9 and 10. Before any recovery B was suffered Henry died, leaving issue the plaintiff. By lease and release dated April 12 and 13, 1725, to which the heir of the surviving trustee of the deed of 1661 was a party, Philip, the father, and Philip, the son, covenant to suffer a recovery in which Thompson and Fairfax were to be tenants to the præcipe, to the use, as to part, of Philip, the father, his heirs and assigns, and as to the other part to the use of Philip, the father, for life, remainder to Philip, the son, in fee. C In Trinity Term, 1725, a recovery was suffered in which were the same tenant to the præcipe, the same demandant, and the same vouchees (except Henry, who was dead) as were covenanted to be by the first deed. It was likewise suffered within twelve months after the first deed.

The father, Philip Stapilton, being dead, the plaintiff, as son and heir of Henry, brought his bill to establish his title to the premises in question and for the whole D estate as tenant in tail under the old settlement, to be let into possession, for an account of rents received by Philip Stapilton, the son, due since the death of the plaintiff's grandfather, to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents. The defendant, Philip, the son, by his answer confessed the several deeds before mentioned, but said that Henry was a bastard, and that, by virtue E of the deed of 1725 and of the recovery, he, the defendant, was entitled to the whole estate in question. Upon an issue directed Henry was found illegitimate, and the cause was now heard upon the equity reserved, when counsel for the plaintiff, waiving the claim to the whole estate, insisted upon these two points: (i) that the recovery suffered in Trinity Term, 1725, should enure to the use of the deeds of Sept. 9 and 10, 1724, and not to the uses of the deed in 1725; (ii) sup- F posing it did not, yet that the deed of 1724 was such an agreement as the court would carry into execution.

LORD HARDWICKE, L.C.—The plaintiff in this case is entitled to have a decree. There was a sufficient foundation for Philip, the father, and Henry and Philip, his two sons, to execute the lease and release of Sept. 9 and 10, 1724. It G was to save the honour of the father and his family and was a reasonable agreement, and, therefore, if it is possible for a court of equity to decree a performance of it, it ought to be done.

It would be very hard for the defendant on his side to endeavour to set aside this agreement and the effect of this deed. Consider the state and situation of the family at the time of making the agreement. Philip had those children grown up, H he had a very considerable real estate, both his sons were then owned as legitimate, their father and mother had lived together as husband and wife for many years, and at the time of this agreement were so, there was a foresight in the father and mother that a dispute between their two sons might hereafter arise, to their dishonour and likewise that of the family. The foundation of this agreement, the illegitimacy of the eldest son, Henry, has now been determined by trial. It is I found that Henry was a bastard, yet both the sons are of the same blood of the father equally, though not so in the notion of the law. If the elder son should be found illegitimate (as he now is) the father knew he would be left without any provision if no agreement was made, and, on the other hand, if his legitimacy should be established, then Philip the younger son would have nothing. To prevent disputes and ill consequences the father brings both his sons into an agreement to make a division of his real estate. It is very plain the parties did not know who was the heir of the surviving trustee in the settlement of 1661 at the time of the lease and release of Sept. 9 and 10, 1724, because they covenant that

a writ of entry should be sued out within twelve months, which is a very unusual time to limit to suffer a recovery and done in order to give time to find out the heir of the surviving trustee, if they could find him out. He was afterwards found and made a party to the deeds of Sept. 28 and 29, 1724. A

The bill is brought by the eldest son and heir of Henry to have the benefit and possession of the whole estate, to have an account of the rents and profits, to be quieted in the possession, and for general relief. On the first hearing an issue was directed to try whether Henry, the father, was legitimate, and it was found he was not. Now the plaintiff insists upon having the benefit of this agreement, whereby he is only entitled to a part. This being the bill of an infant, he may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by his bill; but it might be otherwise in the case of an adult person. B C

Upon this case there arise two general questions: (i) whether the plaintiff has any estate in law by virtue of any of the conveyances, or by the recovery; (ii) if he has no estate at law or only a defeasible one, whether he is entitled to have the benefit of this agreement and to have it carried into execution here. The first question consists of two branches: (i) whether the lease and release of Sept. 9 and 10, 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April, 1725; (ii) if not, whether the recovery of Trinity Term, 1725, having barred the estate tail, will make good any estate which passed by the lease and release of Sept. 9 and 10, 1724. D

His Lordship discussed these questions, held that the recovery suffered in 1725 did enure to make good and render indefeasible the base estates created by the deed of 1724, and continued: It has been objected that, if the plaintiff has any title, his remedy is at law, but I think it is more properly here. He is an infant and has come recently into this court, nor do I think this case depends entirely upon the point of law, for I am of opinion that the plaintiff is entitled to have an execution of the agreement as a good and binding agreement in this court. The question is whether there was any valuable consideration on all sides for entering into this agreement. If so, then there is a sufficient ground for coming here, but a mere volunteer is not entitled to come here for an execution of an agreement. But here is a proper consideration as appears in the recital of the deed of 1724. Neither is it the common case of a bastard, for the law of England does allow of some privileges to a bastard eigne [first-born], and his parents are not punishable by the canon law for antenuptial fornication. E F

In *Cann* v. *Cann* (1) it was laid down by Lord Macclesfield that an agreement entered into upon a supposition of a right or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other, and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement. G

Another objection has been made to this agreement, that the benefit on Henry and Philip's side was not mutual and equal. During both their lives the benefit and obligation was mutual, and Henry would have been equally compellable to suffer a recovery with Philip. It is said that an alteration as to their mutual benefit has happened by the death of Henry, and it is said that, if Henry had been legitimate the plaintiff would not have been compellable to suffer a recovery, because the issue in tail is not compellable to perform the covenants of his ancestor the tenant in tail. But here the chance was at first equal, and it is hard to say that the act of God should hinder the agreement from being carried into execution. The chance was equal who died first, Henry or Philip. If Henry had been legitimate, and Philip had died in Henry's life, leaving children, I am of opinion that Philip's son would have been entitled to have come against Henry for an execution of the agreement. Therefore, the chance was at first equal on both sides, and we are not to consider how the event has happened. H I

Another objection has been taken, that the father made use of his coercive

power over Philip to force him into this agreement, and it is said that equity does not favour agreements made by compulsion. But this court always considers the reasonableness of the agreement. Besides, here is no proof of compulsion by the father. If there was any compulsion, it seems rather to have been made use of against Henry, who was then esteemed his eldest son, and, considering the consequence of setting aside this agreement, a court of equity will be glad to lay hold of any just ground to carry it into execution and to establish the peace of a family.

HIS LORDSHIP, therefore, declared that the plaintiff was entitled to the lands and premises limited in remainder to the first son of Henry Stapilton, his father, by the deeds of Sept. 9 and 10, 1724, according to the uses therein and to the benefit of the covenants in those deeds, and decreed the defendant Philip to come to an account for the rents of the premises, and declared that Philip was entitled to hold the lands limited by the deeds of September 9 and 10, 1724, to Philip the elder for life with a remainder to the defendant for life, against the plaintiff and his heirs, and that the defendant should make further assurance to the plaintiff of his part, and the plaintiff the like assurance to the defendant of his part, with no costs on either side.

HUTCHINS *v.* CHAMBERS AND OTHERS

[COURT OF KING'S BENCH (Lord Mansfield, C.J., and other judges), January 31, April 14, 20, 1758]

[Reported 1 Burr. 579; 2 Keny. 204; 97 E.R. 458]

Rates—Non-payment—Distress—"In nature of execution"—Liability to distress of privileged property.

Distress for unpaid rates is in the nature of execution rather than in that of distress for rent, and, therefore, certain things which are privileged from distress for rent, e.g., beasts of the plough, may be distrained for rates although there be other sufficient distress.

Distress—Second distress—Generally unjustifiable—Reasonable mistake as to value—Uncertain value.

A second distress taken under the same warrant as the first when enough might have been taken on the first distress to satisfy the debt cannot be justified, except where the person seizing the goods on the first occasion reasonably mistook their value, for example, where the goods were of uncertain value as pictures, jewels, or racehorses. The value of such goods may even depend on whim and fancy, and there is no reason why, if the officer who seizes makes an insufficient seizure the first time, he should not be at liberty to seize a second time.

Notes. Considered: *Hudd* v. *Ravenor* (1821), 5 Moore, C.P. 542; *Bagge* v. *Mawby* (1853), 8 Exch. 641; *Owens* v. *Wynne* (1855), 4 E. & B. 579. Applied: *MacGregor* v. *Clamp*, [1914] 1 K.B. 288; *MacCreagh* v. *Cox and Ford* (1923), 92 L.J.K.B. 855. Considered: *Swaffer* v. *Mulcahy*, *Hooker and Mulcahy*, *Smith* v. *Mulcahy*, [1934] 1 K.B. 608. Applied: *Rawlence and Squarey* v. *Spicer*, *Withers & Co.* v. *Spicer*, [1935] 1 K.B. 412. Considered: *Hickman* v. *Potts*, [1939] 3 All E.R. 794. Referred to: *Durrant* v. *Boys* (1796), 6 Term Rep. 580; *Nargett* v. *Nias* (1859), 1 E. & E. 439; *Grunnell* v. *Welch*, [1905] 2 K.B. 650; *Queen Anne's*

Bounty v. *Thorne*, [1934] 2 K.B. 175; *Potts* v. *Hickman*, [1940] 4 All E.R. 491; *Watkinson* v. *Hollington*, [1943] 2 All E.R. 573. A

As to second distress and distress for rates, see 12 HALSBURY'S LAWS (2nd Edn.) 149–151, 170–175. For cases see 18 DIGEST (Repl.) 348–350, 362, 415, 446 and 387 et seq.

Cases referred to: B

(1) *Anon.* (1696), 3 Salk. 136; 91 E.R. 737; 18 Digest (Repl.) 389, *1394*.

(2) *Vinkinstone* v. *Ebden* (1698), Carth. 357; Holt, K.B. 674; 1 Ld. Raym. 384; 5 Mod. Rep. 359; 12 Mod. Rep. 216; 1 Salk. 248; 90 E.R. 809; 18 Digest (Repl.) 422, *1682*.

(3) *Wallis* v. *Savill* (1701), 2 Lut. 1532; 125 E.R. 843; 18 Digest (Repl.) 349, *963*.

(4) *Lyne* v. *Moody* (1729), Fitz.-G. 85; 94 E.R. 665; sub nom. *Lynne* v. *Moody*, 2 Stra. 851; sub nom. *Lisne* v. *Moody*, 1 Barn.K.B. 184; 18 Digest (Repl.) 381, *1315*. C

(5) *Moir* v. *Munday* (1755), Say. 181; 96 E.R. 845; 18 Digest (Repl.) 377, *1269*.

Special Case from Surrey Assizes in an action of trespass tried by WILLES, C.J. in 1755.

The action was brought against justices of peace, parish officers, constables, and their assistants for executing a warrant of distress made by the two justices upon a poor-rate amounting to £13 2s. A verdict was found for the plaintiff against all the defendants, subject to the opinion of the court upon the whole matter. D

The distress at first taken was five geldings, stated to be beasts of the plough and cart with their halters, which first distress not being sufficient, they distrained a second time, under the same warrant and took three other geldings, which were stated to have been also beasts of the plough and cart, of the value of £36 17s. with their halters. It was expressly stated, E

> "that upon the former distress, there were other goods, etc., more than sufficient to answer the value of the demand, besides these beasts of the plough and cart."

There were five questions stated for the opinion of the court, viz.: (i) whether the rate and assessment was a good and sufficient rate and assessment, in point of law; and, if not, then whether the plaintiff could avail himself of any objection to it; (ii) whether the warrant ought to have fixed and limited the time within which the geldings and goods distrained were to be sold, and whether, for want thereof, the warrant was void, and the defendants, or any, and which of them, were trespassers; (iii) whether the second distress was at all justifiable; (iv) whether the geldings, being beasts of the plough and used by the plaintiff both for the plough and cart, were liable to be taken and distrained for the said rate and assessment; (v) whether upon the whole state of the case, the plaintiff's action was maintainable against the defendants, or any, and which of them. A sixth question, whether the second distress was not excessive, arose upon the argument. F G H

Jan. 31, 1758. *Knowler* for the plaintiff; *Gould* for the defendants.

April 14, 1758. *Stowe* for the plaintiff; *Williams* for the defendants.

April 20, 1758. **LORD MANSFIELD, C.J.,** delivered the following opinion of the court: Upon the first argument the two first objections were laid out of the question, especially since the Poor Relief Act, 1743 [almost entirely repealed]. So that the justices were out of the case. For, a defect in the rate (unappealed from) could not avoid the warrant, nor is the warrant void, so as to make it a trespass ab initio. The justices could not be trespassers, by what the officers afterwards did. I

It was, therefore, reduced to three questions, viz., (i) whether (upon the first distress) averia carrucæ could be taken and distrained for a poor-rate and assessment when there were other things that might have been distrained, and which were more than sufficient to answer the value of the demand. The second question

A turned upon two objections to the second distress, viz., (a) whether the second distress under the same warrant was at all justifiable when there was enough that might have been taken upon the first, and (b) whether, this second distress being excessive, that circumstance alone was not a sufficient ground to maintain this action of trespass, independent of any other consideration.

On the second argument, counsel for the defendants not only argued very well B as counsel for his client, but he explained the whole learning of distress at common law, which were nomine pœnæ, not a satisfaction, and, as I adopt the reasoning of his argument throughout, to avoid repetition now I will in a great measure refer to it for the grounds of the opinion which the court is of.

The first question is whether averia carrucæ may be taken for a distress upon the poor rate where there are other distrainable goods sufficient. As to this, the C solid distinction is that the seizing under the Poor Relief Act, 1601, and such like Acts of Parliament is but partly analogous to the common law distress (as being replevisable, etc.), but is much more analogous to the common execution, like a fieri facias where the surplus after sale shall be returned. In the old common law distresses, which were in nature of a nomine pœnæ to compel payments, it would have been absurd to have suffered the implements by which a man gains his D livelihood to be held as a pledge, because that would have been taking from the man the only means he had of being able to pay the debt. But this reason does not hold where the things distrained may immediately be sold by way of satisfaction, which, though called a distress, yet really is, in this respect, an execution.

The adjudication said to have been made in 1696 in *Anon.* (1), was very properly cited by counsel for the defendants as no sufficient authority, and not (of itself) to E be relied upon, but I take it that the same reason was gone upon, in *Vinkinstone* v. *Ebden* (2), where Sir John Holt, C.J., says:

> "it is true, a horse cannot be distrained in a smith's shop, etc.: but there is no such restriction, where the distress is for a personal duty."

And he observed that the duty in that case arose out of the goods laden to be F exported, so that by their being laden, the duty commenced, and the ship became chargeable, and, a fortiori, any part of her. I take the meaning of what he there says of personal duties to be applicable to the case of Parliamentary duties alluded to in *Anon.* (1), and consequently to be agreeable to *Anon.* (1) which says it was adjudged

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> "that this common law exemption of utensils, tools, instruments of husbandry, etc., from distress, holds only in distresses for rent-arrear, amerciaments, etc., but doth not extend to cases where a distress is given in the nature of an execution, by any particular statute, as for poor-rates, etc.

Therefore, it is more analogous to an execution than to a distress at common law, and there (in cases of execution) averia carrucæ may be distrained, although there H be other sufficient distress.

On this ground we are all of opinion that there is no objection to the first distress from the averia carrucæ being taken, for they are distrained under the Poor Relief Act, 1601, and such like Acts of Parliament.

As to the second distress, the first question relating to that is whether this second distress can be at all justified as it was a second distress taken under the same warrant I when enough might have been taken at first, if the distrainer had then thought proper. A man who has an entire duty shall not split the entire sum and distrain for part of it at one time and for other part of it at another time, and so toties quoties for several times for that is great oppression. That is *Wallis* v. *Savill* (3) where the second distress was held unjustifiable, because both distresses were taken for one and the same rent and it was the lessor's folly that he had not taken a sufficient distress at first. But if a man seizes for the whole sum that is due to him and only mistakes the value of the goods seized (which may be of very uncertain, or even imaginary value, as pictures, jewels, racehorses, etc.) there is no reason why he should not

afterwards complete his execution by making a further seizure. How can the officer who seizes, judge of the real or perhaps imaginary value of the horses or goods seized? The value of them may be quite unknown to him, or may even depend upon whim and fancy.

It is to the advantage of the owner of the goods that this should be so. It is better for him that the officer should be at liberty to seize a second time if he makes an insufficient seizure the first time. Or else it might induce him to a necessity of taking effects of a very great value at first, for if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at first. Pictures, horses, jewels, books, and some other such effects, may be of so uncertain and even imaginary or fancied value that it may be exceedingly uncertain how much money they may fetch, when they come to be sold so that the person seizing may not be at all able to judge how much they may produce upon sale. If he does not take the value of the whole at first (out of tenderness and moderation perhaps), there is no reason why he should not complete it by a second seizure; provided it be for the same sum due. Therefore, this first objection to the second distress fails.

The second objection to this second distress is the third remaining question, namely, whether the taking an excessive distress is a sufficient ground to maintain an action of trespass. Several authorities have been cited to show that an action of trespass will not lie for taking an excessive distress, but that it ought to be a particular action grounded upon the statute, and particularly one case, *Lynne* v. *Moody* (4), where it had been adjudged for the plaintiff in the Common Pleas. But the judgment of the Common Pleas was reversed. It was said that the remedy ought to be by special action founded on the Statute of Marlbridge. So that it has been sufficiently established that a general action of trespass cannot be maintained for taking an excessive distress.

One case, indeed, was cited to the contrary, which was *Moir* v. *Munday* (5). That was an action of trespass where six ounces of gold and one hundred ounces of silver were taken for 6s. 8d., which was held to be an excessive distress, and judgment was given for the plaintiff. But that appeared upon the face of it and upon the pleadings to be excessive, and so the court expressly declared. It was a distress of gold and silver which are of a certain known value and even the measure of the value of other things. But it was there held that

> "in all other cases of goods or other things of arbitrary and uncertain value, it must be an action upon the statute."

This (as I am told) was the distinction there taken, and that is, therefore, an exception (and was there considered as being so) from the general rule and serves to confirm the rule itself. [NOTE. Under present practice an action for damages lies for any illegal, irregular, or excessive distress.]

We are, therefore, all of us of opinion that there is no cause of action maintainable by the plaintiff in the present case, nor has he any right to recover against any of the defendants, and that the defendants be at liberty to enter a nonsuit.

Judgment for defendants.

A

KINGSTON-UPON-HULL CORPORATION *v.* HORNER

[Court of King's Bench (Lord Mansfield, C.J., Aston, Willes and Ashhurst, JJ.), Trinity Term, 1774]

[Reported 1 Cowp. 102; Lofft., 576; 98 E.R. 989]

B *Crown—Grant by Crown—Presumption—Possession for substantial time, though not commencing before time of legal memory.*

A grant from the Crown may be presumed where privileges and duties under it have been exercised and performed under it for a substantial time, e.g., 350 years, although the commencement of the period is not before the time of

C legal memory.

Per Lord Mansfield, C.J.: All matters which were necessary to the perfection of the thing shall be presumed to have been solemnly done rather than that ancient grants should be called in question, although the grant cannot now be shown. . . . The principle is a right one, namely, in favour of rights which parties have long been in the peaceable and quiet possession of.

D **Notes.** Referred to: *Eldridge* v. *Knott* (1774), 1 Cowp. 214; *Sawbridge* v. *Benton* (1793), 2 Anst. 372; *Hillary* v. *Waller* (1806), 12 Ves. 239; *A.-G.* v. *Parmeter*, [1803–13] All E.R.Rep. 157; *Lowden* v. *Hierons* (1818), 2 Moore, C.P. 102; *A.-G.* v. *Horner*, [1913] 2 Ch. 140; *British Trawlers' Federation, Ltd.* v. *London and North Eastern Rail. Co.*, [1933] 2 K.B. 14.

As to presumption of Royal grants, see 7 Halsbury's Laws (3rd Edn.) 318–320.

E For cases see 11 Digest (Repl.) 658, 659.

Cases referred to:

(1) *Exeter Corpn.* v. *Trimlet* (1759), 2 Wils. 95.

(2) *Yarmouth Corpn.* v. *Eaton* (1763), 3 Burr. 1402; 97 E.R. 896; 47 Digest (Repl.) 769, *1047*.

F (3) *Purbeck's Case* (1678), Collins's Baronies by Writ, 293; Cruise on Dignities, 113; sub nom. *R.* v. *Viscount Purbeck*, Show Parl. Cas. 1; 1 E.R. 1, H.L.; 37 Digest (Repl.) 41, *180*.

(4) *Bedle* v. *Beard* (1607), 12 Co. Rep. 4; 77 E.R. 1288, L.C.; 11 Digest (Repl.) 658, *813*.

Also referred to in argument:

G *Powel* v. *Milbank* (1772), 2 Wm. Bl. 851; 1 Cowp. 103, n.; 3 Wils. 355; 96 E.R. 502; sub nom. *Bowell* v. *Milbank*, 1 Term Rep. 399, n.; 19 Digest (Repl.) 392, *1928*.

R. v. *Carpenter* (1679), 2 Show. 47; 89 E.R. 784; 16 Digest (Repl.) 396, *1900*.

Warren d. Webb v. *Greenville* (1740), 2 Stra. 1129.

Crimes v. *Smith* (1588), 12 Co. Rep. 4; 77 E.R. 1287, Ex. Ch.; 19 Digest (Repl.)

H 391, *1904*.

Rule Nisi obtained by the defendant calling on the plaintiffs to show cause why an order should not be granted, on the ground of misdirection of the jury, for the new trial of an action in which the plaintiffs claimed from the defendant dues for the importation of certain goods into the port of Kingston-upon-Hull.

The case appeared, upon the report of Gould, J., who tried the cause, to be as

I follows. The declaration consisted of six counts stating that the plaintiffs, on June 5, 1772, and long before and ever since had received and were lawfully entitled among other tolls and duties to a reasonable toll or duty called water-bailiff's dues for certain goods, specified in the particular counts, imported into the port of Kingston-upon-Hull; that the defendants had imported such goods; and were, therefore, liable to the duty. Upon the general issue pleaded the plaintiffs at the trial produced first an entry from their corporation books entitled as follows:

"A particular note of all such duties, etc., as by the water-bailiffs, are to be

received for the use of the mayor and burgesses of Kingston-upon-Hull, according to the order prescribed and set down in the year 1441, John Bedford then being mayor, and continued and put in use from that time to this present day April 1, 1575."

In this list were included the duties in question. The plaintiffs then produced an order of the corporation of 1571 requiring the water-bailiff, every eight or fourteen days to give to the chamberlain an account of all moneys received by him for the use of the town with a direction to the chamberlain to keep these accounts separate from his other receipts. Then followed a particular account of these moneys so received from 1545 to 1646, other entries from 1648 to 1678 of persons who had rented the office of water-bailiff, and an account of the dues for three years in 1726. They concluded by the parol testimony of several witnesses who had paid the duties in question from the year 1734, together with an estimate of repairs done by the corporation valued at £15,000.

On behalf of the defendant it was observed that the earliest book of the corporation was dated 1342 and the date of their original charter of incorporation was 1299, a full century subsequent to the time of legal memory. Their title, if any, to the duties in question could be supported only by prescription or charter. The first certainly did not exist, they being a corporation within time of legal memory, and in respect of the second it was clear upon the face of a charter granted in 1382 that the King at that time only erected or authorised the corporation to erect the port, but granted no duties. The words of this charter of 1382 were as follows:

"Concessimus quantum in nobis est, etc., quod habeant portum subtus eandem villam dudum vocat. Sayercreek jam Hull, in perpetuum annexum villæ, ita quod possint ædificare domos kaias et staiethas, ad emendationem, defensionem et salvationem villæ prædictæ."

To this it was answered that a usage of three hundred years was a sufficient ground to presume a grant of the duties in consideration of repairs which it was in proof the corporation had constantly done from the year 1441 to the time of bringing the action.

Gould, J., in his direction to the jury said he thought, and, therefore, left it to them to say, whether the words "portum dudum vocat, Sayercreek jam Hull" did not imply that the port so called was an existing port before and at the time of the charter of 1382 rather than a creation of the port, and also whether they would not consider the usage from the year 1441 to the time of the action brought a sufficient ground to presume a grant of the duties between 1382 and 1441. The jury, accordingly, found a verdict for the plaintiffs.

Wallace and *Davenport* for the plaintiffs, showed cause against the rule.
Dunning, *Lee*, *Wilson* and *Norton*, for the defendant, supported the rule.

LORD MANSFIELD, C.J.—The ground upon which an application for a new trial has been made in this case is that there was no evidence of title in the plaintiffs to the port duties claimed by the action which ought to have been left to the consideration of the jury, and, if no title was made out which in point of law it was fit for them to exercise their judgment upon, there ought to be a new trial.

There are two grounds upon which it is contended that there was sufficient evidence of title in the plaintiffs to be left to the jury. First, it was said that there was an ancient port of Hull in the King before 1382, with duties annexed to it, particularly those in question, which duties belonged to the King in right of the port. If such a port and duties did exist in the King, it is not disputed, nor can a doubt be made, but that he might grant them to a subject, and that they were granted is contended from the general words of the charter confirmed by usage. If this ground can be supported, there is an end of the motion for a new trial because the jury have had that left to them which ought to have been left to them.

But, secondly, if that be not so, and if it is clear from the words of the charter of 1382 that no port existed before that date, but that the charter itself erected the port only without any duties, then it is contended that between 1382 and 1441 there might be some charter from the King, creating and giving these duties to the corporation on a ground which would support them in point of law, namely, on the consideration of repairs and the general advantage to be derived by the public from its being properly kept up. This was the only point made at the trial, and the question that arises on it is whether on the evidence it was properly left to the jury to presume such a grant between 1382 and 1441.

I lay out of the case that which might have been a foundation for a new trial, I mean the idea of new light to be got from the entries in the corporation books, because there has been an inspection, and, therefore, no surprise, and as to spoliation the court cannot, on a bare allegation, after inspection had, go upon a surmise of that kind especially as since the trial no application has been made to see them.

With regard to the first point, that is, the construction of the charter of 1382 the case stands thus. It is proved by strong evidence that from the year 1441 down to the raising of this question, which comprehends a period of nearly 350 years, these duties have been exacted and submitted to without suit or litigation. It likewise appears from a charter of 1661, which is above a century ago, that the corporation at that time made an application to the King, apprehending that they had a title to these duties by virtue of a right immemorial, and the King upon their representation confirms them thus:

> "Whereas we are credibly informed that within the said town, there is an immemorial custom that every merchant or other coming into the water with ships and goods, and unlading the same within the port of the said town, has been accustomed to pay certain fees, etc., for the same, we will that the said custom shall continue, and that the said mayor and burgesses shall enjoy the like fees, etc., as of time immemorial for the support of the great burdens and expenses of the said mayor and burgesses in and about the reparation, preservation and defence of the said port."

There is a like charter of confirmation in the reign of James II.

It is said that these charters relate to port duties of time immemorial, and the corporation then built their right to them upon immemorial usage, which cannot be because both the corporation itself and the grant of the port by the charter of 1382 are within time of memory. But if at the time of the grant, the duties had existed immemorially in the King, the source of their claim is a prescriptive right and their title a derivative title to that which was in the Crown from time immemorial, though they themselves are a corporation within memory.

As to the construction of the charter of 1382, so far from thinking it clear that the charter meant to create the port, if I was to determine that question, I should hold that the port existed before. The grant is, that they shall have "portum subtus eandem villam, dudum vocat. Sayercreek jam Hull." In the first place then consider what is a port? It is the water. The terms are synonymous, for the limits of the water make the port. Secondly, what is that which is described as having been once called Sayercreek? On the plain construction of the words, it must be the port and not the town, for so early as the charter of 1299 the town is described by the name of "Kingston supra Hull," meaning the river Hull. It is, therefore, apparent from this charter that the name of the port had before that time been changed from "Sayercreek" to "Hull," and, if never granted out of the hands of the Crown until 1382, it clearly must have remained in him at that time. He grants that the port shall be for ever annexed to the town, which, in my opinion, strengthens the construction of its being an ancient port by affording an inference that before that time the corporation had only the benefit of it, whereas in future they were to be the owners and proprietors. But there are still other words that support this construction, namely, that they should have the port "without the interposition of the King's officers or Ministers." This was a very

material and necessary privilege if the port had existed before and the King's officers had been accustomed to collect the duties for the Crown. If it were a new erected port, the grant might have been considered as an absolute exclusive grant. But, admitting it to be doubtful whether it was an ancient or a new erected port, the question is a question of fact, and, therefore, most proper to be left to the decision of a jury who on the evidence, which in this case was the strongest possible, namely, enjoyment for 350 years, have found in favour of the claim.

Before I proceed to the next ground I should observe that a question was made whether the grant could have a legal commencement, that is, supposing the charter of 1382 to have created the port, and the duties to have been incidentally granted in consideration of the repairs, whether such grant would support the claim. If the case turned upon that question only, I should take time to consider of it, and to look into the cases cited by counsel supporting the rule. But it seems to be taken for granted in *Exeter Corporation* v. *Trimlet* (1), and afterwards in *Yarmouth Corpn.* v. *Eaton* (2), that ports are like markets with which the Crown is entrusted, and that the King may grant the duties to a subject in consideration of repairing the port.

The next ground is the presumption of a charter between 1382 and 1441. With regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is that all evidence is according to the subject-matter to which it is applied. There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar, as where the Statute of Limitations is pleaded in bar to a debt. Although the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription if there could be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not and to draw their inference one way or the other according to circumstances. For instance, there is no Statute of Limitations that bars an action upon a bond [see now Limitations Act, 1939: 13 HALSBURY'S STATUTES, (2nd Edn.) 1159], but there is a time when a jury may presume the debt to be discharged as where no interest appears to have been paid for sixteen years. But if a witness is produced to prove the contrary, as by showing the party not to have been in circumstances to pay, or a recent acknowledgment of the debt, the jury must say the contrary. If a foundation can be laid that a record or a deed existed and was afterwards lost, it may be supplied by the next best evidence to be had, or if it cannot be shown that it ever existed, yet enjoyment under a title which can only be by record is strong evidence to be left to a jury that it did once exist. I do not known an instance in which proof may not be supplied. These are general rules, and it would be mischievous if it were to be laid down that there can be no presumption since the time of Richard I [1189–1199] to confirm a title by charter.

In *Purbeck's Case* (3) the letters patent which were the only proper evidence of his title could not be found and there was no proof of the record having been lost, but he had sat in Parliament, had levied a fine of his honours to King Charles II, and, I think, enjoyed it to the time of his death. All the other facts were subsequent to the creation, yet the House of Lords were of opinion in favour of the claim, and presumed that the letters patent had existed. Indeed, before the decision, the bill of the letters patent was said to be found at the Privy Seal Office, but that was only presumptive evidence, for the King might have recalled it before it passed the Great Seal.

Bedle v. *Beard* (4), determined by LORD ELLESMERE, L.C., with the assistance of the judges upon deliberation, is a case in point and of very great authority, and it is not liable to the distinction which counsel for the defendant endeavoured

to make because there was no possibility of its being a grant within memory. The case states that in 1303 the King, being seised of the manor of Kimbolton to which the advowson of Kimbolton was appendant, by letters-patent granted the manor with the appurtenances to Humphrey de Bohun, Earl of Hereford in tail general. Humphrey de Bohun, the issue in tail, in 1365 (? 1366) granted the advowson to the prior of Stoneley and his successors, by which it became impropriate. The points were two: whether the grant of the manor "cum pertinentiis" passed the advowson; it was adjudged that it could not: secondly, whether the grant by tenant in tail was not void. On this second point, it was resolved by Lord Ellesmere and the principal judges that notwithstanding the advowson did not pass by the grant of the King under the words "cum pertinentiis" and so the issue in tail had nothing in it at the time of this grant to the prior, yet it shall now (1607) be intended in respect of the ancient and continual possession that there was a lawful grant of the King to the said Humphrey, so that he might lawfully grant to the priory. For all matters which were necessary to the perfection of the thing shall be presumed to have been solemnly done, rather than that ancient grants should be called in question, though the grant cannot now be shown. It was further observed in that case that ancient possession would injure instead of strengthening a title if after a succession of ages and the decease of parties objections should prevail which might have been answered in the lifetime of the parties, and, if well founded, would most probably have been sooner made.

I remember in general, though I cannot recollect the particulars of it, a case in the Duchy Court between the King and Mr. Brown of Snelbrook. It was before the late nullum tempus bill [i.e., the Crown Suits Act, 1769]. The evidence in support of the title was a possession and enjoyment of 100 years, and I held that, though such possession and enjoyment could not conclude as a positive bar, because there was no Statute of Limitations against the Crown, yet it might operate as evidence against the Crown of right in the defendant if the claim could have a legal commencement, though such commencement could not be shown.

In questions of this kind possession goes a great way, but there is no positive rule which says that 150 years possession or any other length of time within memory is a sufficient ground to presume a charter. In the case of a supposed byelaw usage is allowed to support it without any proof of the existence of such a byelaw or of the loss of it. But the principle is a right one, namely, in favour of rights which parties have long been in the peaceable and quiet possession of. I have myself taken it to be established in point of law that, though the record be not produced nor any proof adduced of its being lost, yet under circumstances it may be left to the consideration of a jury or of a court of equity if the case comes properly before them, whether there is not a sufficient ground to presume a charter. Therefore, in the present case, taking it for granted that such charter would have given the plaintiffs a title, I think it was properly left to the jury to say whether they would presume such grant. I am of opinion that the direction was proper on both points, but I ground myself chiefly upon the first, that is, that it was rightly left to the jury to say whether there was or was not an ancient port before and at the time of the charter of 1382. Indeed, I should be loath to send the cause to a new trial after a usage of 350 years, even if the fact were much more doubtful. If, upon search of the corporation books any new discovery shall be made that can throw light on the subject, this verdict will be of no prejudice in a new action.

ASTON, WILLES, and **ASHHURST, JJ.,** were of the same opinion.

Rule discharged.

A

LOWE *v.* PEERS

[Court of King's Bench (Lord Mansfield, C.J., Yates, Aston and Willes, JJ.), May 9, 13, 14, 1768]

[Reported 4 Burr. 2225; 98 E.R. 160]

B

Contract—Breach—Damages—Liquidated damages—Agreed sum recoverable—Penalty—Election to recover penalty or sue for breach.

Where a contract specifies a sum as being payable on a breach of the contract, if the sum is liquidated damages, i.e., a sum agreed on by the parties and of the essence of the agreement, the court has no power to assess the damages, but must award the agreed sum.

C

If, however, the sum is a penalty to secure the due performance of the contract, the plaintiff may either bring an action to recover the amount of the penalty, or, if he elects not to go for the penalty, he may proceed for breach of the contract and recover more or less than the penalty.

Contract—Illegality—Public policy—Restraint of marriage—Covenant not to marry another person—Covenant to pay £1,000 on breach.

D

The defendant executed a contract under seal in the following terms: "I do hereby promise Mrs. C. L. that I will not marry with any person besides herself: if I do, I agree to pay to the said C.L. £1,000 within three months next after I shall marry anybody else."

Held: the contract was illegal as being in restraint of marriage, and Mrs. C.L. could not recover on it.

E

Notes. Considered: *Wall* v. *Rederaktiebolaget Luggude*, [1915] 3 K.B. 66. Referred to: *Fletcher* v. *Dyche* (1787), 2 Term Rep. 32; *Astley* v. *Weldon*, [1775–1802] All E.R.Rep. 606; *Gibson* v. *Dickie* (1815), 3 M. & S. 463; *Galsworthy* v. *Strutt*, [1843–60] All E.R.Rep. 515; *Hurst* v. *Hurst* (1849), 4 Exch. 571; *Mercer* v. *Irving* (1858), 27 L.J.Q.B. 291; *Hall* v. *Wright*, [1843–60] All E.R.Rep. 734; *Davis* v. *Bomford* (1860), 6 H. & N. 245; *Re Lanyon*, *Lanyon* v. *Lanyon*, [1927] All E.R.Rep. 61.

F

As to liquidated damages or penalty see 11 Halsbury's Laws (3rd Edn.) 298–302, and as to void and illegal contracts, see 8 Halsbury's Laws (3rd Edn.) 125 et seq. For cases see 17 Digest (Repl.) 148 et seq., and 12 Digest (Repl.) 263 et seq., respectively.

G

Cases referred to:

(1) *James* v. *Morgan* (1663), 1 Lev. 111.

(2) *Sir Baptist Hicke's Case* (1616), Jenk. 337; 145 E.R. 245; sub nom. *Sir Baptist Hicks* v. *Goates*, Cro. Jac. 390; sub nom. *Sir Baptist Hixt* v. *Goats and Fleetwood*, 1 Roll. Rep. 257; sub nom. *Goats* v. *Sir Baptist Hixte*, 1 Roll. Rep. 314; 12 Digest (Repl.) 485, *3609*.

H

(3) *Baker* v. *White* (1690), 2 Vern. 215; 23 E.R. 740; 12 Digest (Repl.) 278, *2133*.

(4) *Woodhouse* v. *Shepley* (1743), 2 Atk. 535; 26 E.R. 721, L.C.; 7 Digest (Repl.) 176, *82*.

(5) *Edgcomb* v. *Dee* (1646), Vaugh. 89.

I

Rule Nisi obtained by the defendant, Newsham Peers, for the new trial of an action claiming £1,000 liquidated damages for breach of promise of marriage brought against him by the plaintiff, Catherine Lowe.

By a contract under seal executed in 1757 by the defendant, Newsham Peers, the defendant undertook as follows:

"I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself: if I do, I agree to pay to the said Catherine Lowe £1,000 within three months next after I shall marry anybody else."

In 1767 the defendant married another woman, and the plaintiff brought this action for breach of the contract and non-payment of the £1,000. She averred in her declaration,

> "that she had remained single, and was always willing and ready to marry him, while he continued single; but he married Elizabeth Gardiner."

The defendant pleaded non est factum.

The cause was tried before LORD MANSFIELD, C.J. It appeared, by letters that were read, that there had been a long courtship, and that the obligation was fairly and voluntarily given by the defendant to the plaintiff. The evidence was that the defendant pulled the stamped paper out of his pocket, and wrote, signed, sealed, and executed it in the presence of one witness. A witness who saw it executed, attested it after the defendant was gone. There was no intercourse between the plaintiff and defendant afterwards. The witness to prove this deed swore that the defendant sealed it before he wrote his name "Newsham Peers." Evidence was called, on the other side, to prove the contrary. HIS LORDSHIP directed the jury to find for the plaintiff, with damages £1,000 if they thought the deed to be a good deed. If this direction was wrong, he gave the defendant leave to move for a new trial, without costs. Accordingly, on April 21, 1768, Dunning moved for a new trial, with liberty also to move afterwards in arrest of judgment.

Sir Fletcher Norton, *Cust* and *Wallace* for the plaintiff.
Dunning and *Mansfield* for the defendant.

The motion for a new trial was founded upon an objection to the direction given to the jury, to find the whole sum of £1,000 in damages if they should find for the plaintiff. Counsel for the defendant argued that the jury ought to have been left at liberty to give a less sum if they had thought proper, the jury being judges of the damages as well in covenant as in assumpsit. They cited *James* v. *Morgan* (1), where the jury were directed to give only the value of the horse in damages upon an assumpsit "to pay a barleycorn a nail, doubling it every nail." They also cited and much relied upon *Hixt* v. *Goats and Fleetwood* (2), in 1 ROLL. ABR. p. 703, tit. Trial, pl. 9, where a finding of less was held to be good. The jury are said to be chancellors, and may give such damages as the case requires in equity.

It was answered that where a particular sum is liquidated and fixed by the agreement of the parties and the breach of covenant assigned in non-payment of that money, that fixed sum alone is the measure of the damages.

The motion in arrest of judgment was founded upon the following reasons: All engagements in restraint of marriage are void; this engagement was of that sort; there was no consideration for the contract. It was not reciprocal; here was no mutuality, which is essential to the validity of a contract. It was answered that the whole transaction amounted to a mutual promise to marry each other. The plaintiff's acceptance of the deed was sufficient evidence of her making such a promise. So there were mutual promises and both were bound to perform them. Therefore, there was a consideration for the defendant's promise. In any case this promise was by a deed, and a deed carried its own consideration. This was not an engagement in restraint of marriage generally; it was only a restraint from marrying anybody else but each other. Therefore, it was not like *Baker* v. *White* (3) or *Woodhouse* v. *Shepley* (4).

LORD MANSFIELD, C.J., stated the deed particularly and the declaration upon it, and continued: The words are:

> "I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself: if I do, I agree to pay the said Catherine Lowe £1,000 within three months next after I shall marry anybody else."

The defendant was single at the time, and so was the plaintiff. The second count

avers that the plaintiff was ready to marry the defendant, and that, after the making the deed, he did marry another woman, namely, one Elizabeth Gardiner, yet he, the defendant, did not, when requested by the plaintiff, pay the £1,000 which he had agreed to pay, and so (though often requested) has not kept the covenant made between them as aforesaid. So the breach is assigned in the not paying the £1,000. To this declaration non est factum was pleaded by the defendant, but the jury found that it was his deed and have given £1,000 damages. By law and in justice, he ought to pay the £1,000. Money is the measure of value. Therefore, what else could the jury find but this £1,000 (unless they had also given interest after the three months)?

This is not an action brought against him for not marrying her, or for his marrying anyone else. The non-payment of the £1,000 is the ground of this action, that he did not, when requested, pay the £1,000. The money was payable upon a contingency, and the contingency has happened. Therefore, it ought to be paid.

There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty and recover the penalty, after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole, or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, toties quoties.

Upon this distinction they proceed in courts of equity. They will relieve against a penalty upon a compensation, but where the covenant is to pay a particular liquidated sum a court of equity cannot make a new covenant for a man, nor is there any room for compensation or relief. As in leases containing a covenant against ploughing up meadow, if the covenant be not to plough and there be a penalty, a court of equity will relieve against the penalty, or will even go further than that to preserve the substance of the agreement, but if it is worded "to pay £5 an acre for every acre ploughed up, there is no alternative, no room for any relief against it, no compensation. It is the substance of the agreement. Here, the specified sum of £1,000 is found in damages. It is the particular liquidated sum fixed and agreed upon between the parties, and is, therefore, the proper quantum of the damages. The same reason answers to the motion for a new trial in the present case.

As to the case mentioned by counsel for the defendant, *Hixt* v. *Goats and Fleetwood* (2), it is impossible to support it, for it cannot be that a man should be obliged to take less than the liquidated sum. The writ of error in that case was plainly brought by the defendant. Besides, the damages could never be taken advantage of upon a writ of error. How could the quantum of the damages found by the jury be the subject of a writ of error?

It is, therefore, clear that where the precise sum is not the essence of the agreement, the quantum of the damages may be assessed by the jury, but, where the precise sum is fixed and agreed upon between the parties that very sum is the ascertained damage and the jury are confined to it.

This brings the matter to the validity of the deed. Whatever grounds existed at that time that could avail the defendant to avoid the deed should have come on his part by a proper plea if it would in reality have been a good defence for him. Therefore, if any such ground had existed in this case as did exist in *Woodhouse* v. *Shepley* (4), or any other ground not appearing upon the face of the deed, it ought to have been avoided by a proper plea. Here, we are upon the face of the deed: the plea is non est factum.

It is objected that this is an engagement in restraint of marriage. It is answered that this construction is directly contrary to the words and intention of the deed which amounts to a mutual agreement between these two persons to marry each other; that the plaintiff's acceptance of the deed proves that; that what the jury have found is a sufficient reason to have it supposed that there was such a mutual agreement to marry each other; that this is, at the utmost, only a contract that

A he would not marry any other woman; and that, if he should marry any other woman, he would pay the plaintiff £1,000 within three months after he should so marry any other woman, but is very far from restraining his marrying at all. This is a point of very considerable importance. All these contracts ought to be looked upon (as LORD HARDWICKE said in *Woodhouse* v. *Shepley* (4)) with a jealous eye, even supposing them clear of any direct fraud. In that case LORD HARDWICKE B did not proceed on any circumstances of particular actual fraud, but on public and general considerations, and, therefore, he gave no costs. These engagements are liable to many mischiefs, to many dangerous consequences. When persons of different sexes, attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it, as disapprobation of friends and relations, inequality of circumstances, or the like. C Both sides ought to continue free. Otherwise such contracts may be greatly abused, as by putting women's virtue in danger by too much confidence in men, or by young men living with women without being married. Therefore, these contracts are not to be extended by implication.

Here is not the least ground to say that this man has engaged to marry this woman. Much less does anything appear of her engaging to marry him. There D is a great difference between promising to marry a particular person and promising not to marry anyone else. There is no colour for either of these constructions that have been offered by the plaintiff's counsel. This is only a restraint upon him against marrying anyone else besides the plaintiff. It is not a reciprocal engagement to marry each other or anything like it. This penalty is set up against the defendant, after ten years have passed without any intercourse between the plaintiff E and him. Another reason why we should not strain in favour of this contract is because, if there was really any mutual contract under fair and equal circumstances, the plaintiff will still be at liberty to bring her action, for a void bond can never stand in her way.

Therefore, I think that what passed at the trial was perfectly right; that the measure of damages was the £1,000; and that this was such a contract as ought F not to be carried into execution. *Baker* v. *White* (3) was not near so strong as the present case. That was in restraint of Elizabeth Baker's marrying again. There is a difference between a restraint of a first marriage and a restraint of a second marriage. The plaintiff there was a widow when she gave the bond, and the transaction was, in effect, a mere wager, and nothing at all unfair in it. Yet in that case the bond was decreed to be delivered up to be cancelled.

G

YATES, J. (agreeing on both points): In actions of debt it is fatal to the plaintiff if he mistakes his demand because the demand is not divisible. In covenant, it is divisible. This deed was the only evidence upon which damages could be given. It is a covenant to pay a stipulated sum upon a particular event. The event has happened, the action is brought upon it. On a writ of inquiry the H inquisition would have been set aside if less than the sum specified had been found.

As to *Hixt* v. *Goats and Fleetwood* (2), what LORD MANSFIELD has said is an answer to it. The jury ought to have allowed the stipulated sum for every acre that was wanting. For, according to that rate the purchase-money was paid or agreed to be paid, and according to that rate it ought to have been allowed or I refunded. Part of the money might have been actually paid. On a writ of error, as LORD MANSFIELD has observed, the finding of damages by the jury could not come in question. So far, I am of opinion for the plaintiff, for I think the £1,000 is the proper quantum of damages which the jury were bound to find.

But on the motion in arrest of judgment upon the invalidity of the deed, I am of opinion for the defendant.

This agreement is in restraint of marriage. It is not a covenant to marry the plaintiff, but is one not to marry anyone else, and yet she was under no obligation to marry him. So that it restrained him from marrying at all if she had chosen not

to permit him to marry her. An action of covenant must be founded on the covenant, and the breach assigned within the words of it. If she had requested him to marry her and been refused by him, how must she have assigned the breach? Why, that he, being requested by her to marry, had refused to do so. But what obligation was he under to marry her? Where was the breach of his covenant? This covenant says no such thing as that he would marry her. Tender and refusal must apply to the thing stipulated, but he has not stipulated that he would marry her. As to mutuality of contract, the deed does not import that she shall marry him, neither does her acceptance of it import any such thing. It does not follow from her acceptance of the deed that she either understood he meant to bind himself to marry her or that she engaged to marry him. Possibly, he might not at all mean to marry her, though he bound himself not to marry anyone else. They are two quite different things; one does not follow from the other.

This covenant is illegal, and will support no action, and, therefore, the plaintiff ought to recover nothing upon it.

ASTON, J.: As to the quantum of damages that is expressly stipulated and agreed. I take notice of what is said in *Edgcomb* v. *Dee* (5) (Vaugh. at p. 101) and apply it to the present case.

As to the second point, I have had doubt, but now I clearly concur. If this had been a covenant to marry her, all the consequences which have been mentioned would have followed. But it is not a covenant to marry her. The words import no such thing, and the court cannot suppose fraud. It is only a covenant to pay a sum of money if he shall marry any person besides herself. This is a restraint of marriage, and is illegal and void.

Baker v. *White* (3) was a bond given by a widow, conditioned to pay the defendant White £100 if she should afterwards marry again, and White, at the same time, gave her a like bond, conditioned to pay the like sum to her executors if she should not marry again before she died. She married again, to Baker, and he and she brought their bill to have her bond delivered up. The bond was deemed to be delivered up to be cancelled. There is a difference between a first and a second marriage. The restraint of a first marriage is contrary to the general policy of the law, the public good, and the interests of society, but the frequent customs of copyholds intimate that the restraint of a second is not so. Yet there the bond was decreed to be delivered up. We cannot make a covenant for the man, and he himself has only covenanted not to marry any other person besides the plaintiff.

WILLES, J.: First no new trial ought to be had. The direction of my Lord Chief Justice was right. For here the deed itself liquidated the certain sum. It was ascertained and fixed between the parties themselves, and was, therefore, the true and proper quantum of the damages. Secondly, as to the motion in arrest of judgment I should not think it a proper motion if this was a covenant to marry the plaintiff. But this is only not to marry another. The words are plain and manifest, and the intention seems to have been agreeable to them. The deed was executed in 1757, and the defendant did not marry until 1767. The plaintiff lay by and never made a requisition to him to marry her, but when he married another she brought her action of covenant. It seems to me to have been understood between the parties themselves, and even by the plaintiff herself, in the same sense as we understand it now. If so, it is a restraint upon matrimony and is illegal. It is stronger than *Woodhouse* v. *Shepley* (4).

Rule for new trial discharged: judgment arrested.

[Note. This judgment was affirmed in the Exchequer Chamber on May 26, 1770; Wilm. 364.]

A

BROWNSWORD *v.* EDWARDS

[Lord Chancellor's Court (Lord Hardwicke, L.C.), March 20, 1751]

[Reported 2 Ves. Sen. 243; 28 E.R. 157]

B *Discovery—Privilege—Interrogatory—Answer tending to incriminate.*

Per Lord Mansfield, C.J.: No person is bound to answer an interrogatory if the answer would subject him to punishment, whether that punishment arises by the ecclesiastical law or the law of the land.

Will—Construction—Transposition of words—Giving effect to intention of testator—Construction of "or" as "and."

C The governing rule of construction of a will is to give effect to the intent of the testator which the court is to find out by his words and construe conformably thereto so far as it is possible consistently with the rules of law. If the force of the words is such that the intent cannot be complied with, the rule of law must take place. But the court will construe the words conformably to the intent of the testator as much as possible, arranging them in a different D order and transposing them to comply therewith. In a devise to one and his heirs, and, if he should die before attaining the age of 21 or without issue then over, the court taking the view that the testator did not intend to disinherit the issue, it has been held that "or" should be construed as "and."

Notes. Considered: *Doe d. Usher* v. *Jessep* (1810), 12 East, 288; *Malcolm* v. *Taylor* (1832), 2 Russ. & M. 416; *Anon.* (1853), 21 L.T.O.S. 201; *Grey* v. *Pearson*, E [1843–60] All E.R.Rep. 21. Referred to: *Doe d. Fonnereau* v. *Fonnereau* (1780), 2 Doug.K.B. 487; *Doe d. Harris* v. *Howell* (1829) 10 B. & C. 191; *Doe d. Cadogan* v. *Ewart* (1838), 7 Ad. & El. 636; *Mortimer* v. *Hartley* (1851), 3 De G. & Sm. 316; *Key* v. *Key* (1853), 4 De G.M. & G. 73; *Secombe* v. *Edwards* (1860), 28 Beav. 440; *Re Sanders' Trusts* (1866), L.R. 1 Eq. 675; *Reed* v. *Braithwaite* (1871), L.R. 11 Eq. 514; *Hollington* v. *F. Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35.

F As to resisting answering interrogatories on the ground of incrimination, see 12 Halsbury's Laws (3rd Edn.) 50–53; and for cases see 18 Digest (Repl.) 224–228. As to construction of wills, see 39 Halsbury's Laws (3rd Edn.) 973 et seq., 1141–1143; and for cases see 48 Digest (Repl.) 460–468, 49 Digest (Repl.) 1088–1098.

Cases referred to:

G (1) *Hinks* v. *Harris* (1693), Carth. 271; 4 Mod. Rep. 182; 90 E.R. 760; sub nom. *Hicks* v. *Harris*, Comb. 200; 12 Mod. Rep. 35; sub nom. *Harris* v. *Hicks*, 2 Salk. 548; 27 Digest (Repl.) 535, *4813*.

(2) *Wilson* v. *Prince* (1746), unreported.

(3) *Hillyard* v. *Grantham* (circa 1727), cited 2 Ves. Sen. p. 246; 28 E.R. 159; 21 Digest (Repl.) 315, *732*.

H (4) *Collenson* v. *Wright* (1663), 1 Sid. 148; 82 E.R. 1024; 49 Digest (Repl.) 1091, *10,154*.

(5) *Spalding* v. *Spalding* (1630), Cro. Car. 185; 79 E.R. 762; 49 Digest (Repl.) 832, *7829*.

Demurrer in suit to establish a will.

I Francis Brownsword devised premises to two persons and their heirs to receive the rents and profits until a boy named John Brownsword should attain twenty-one, which would be on Oct. 14, 1746, in trust in the meantime and from time to time to place the same out at interest for the improvement of the estate, and, if he should live to attain the age of twenty-one or have issue, then to the said John Brownsword and the heirs of his body. If John Brownsword should die before the age of twenty-one and without issue then in the same manner he devised it to the same persons in trust till a young girl named Sarah Brownsword should attain the age of twenty-one, which would be at such a time, but if she should happen to die, exactly in the same words as the former devise, then to the other

collateral branches of his family, and for want of such issue to his own right heirs for ever.

John Brownsword attained twenty-one and died without issue, having devised all his estate real and personal to his wife the present plaintiff, who charged in her bill that the son described in the will was the legitimate son of the testator by the defendant Anne Edwards. On this the relief was prayed that the defendant might discover whether she was lawfully married to the testator, at what time, in whose presence, and where, and whether she had not issue thereby. To this discovery Anne Edwards put in a plea that she was not bound to answer. She averred by her plea that the testator was before married to her own sister by whom he had children who survived him, and, consequently, if she was married to him afterwards, it would be an incestuous marriage contrary to law, and she would be subjected to the penalties and punishments the law inflicts on such a crime. It was argued that this plea must be taken to be true, this being a criminal matter, for ever since the statute [28 Hen. 8, c. 7, s. 7], one could not legally marry his wife's sister after the death of his first wife. Then she would be liable to prosecution in the ecclesiastical court for incest, which was of ecclesiastical conusance. [See now Marriage Act 1949: 28 HALSBURY'S STATUTES (2nd Edn.) 653]. It was as much a crime as any made so by the common law, and that it was a grievous one appeared indisputably from one of the canon laws inflicting a penance which in the eye of the law was looked on as a corporal punishment, and when sued in ecclesiastical court her answer confessing it would convict her. She would be liable: *Hinks* v. *Harris* (1), nor was a suit of that kind in the ecclesiastical court put an end to by any statute of limitation or death of either party.

Against the plea it was said that the plaintiff's right was founded on the fact of the legitimacy of her husband. There was a lawful marriage between the testator and the defendant, and every court leant in favour of legitimacy. Defendants might in many instances protect themselves against making discovery attended with penal consequences, but it must be shown that that would necessarily follow, which did not appear in this case, for this was not a natural incest, such as was forbidden by the laws of nature, but only malum prohibitum, put an end to by death of either party, after which a suit could not be instituted in the ecclesiastical court for the punishment. Nor did the case cited determine that the party was subject to ecclesiastical censure, only determining that it was a matter proper for their jurisdiction. On a bill suggesting the wilful loss of a ship for that the party had insured to twenty times the value, though that was made felony by the statute, yet where the defendant was required to set forth what insurances he made on the ship he was never allowed to protect himself against that, of which there are several instances. In *Wilson* v. *Prince* (2), Easter, 1746, a bill was for the earnings of a ship in the East India Co.'s service, which she might have made if she had performed her voyage, charging that the defendant had insured so largely that it was his interest to lose the ship, and requiring an account of what sums were taken up. The defendant pleaded that, having taken up £3,000 of the company and taken an oath to trade for no more, if it appeared that he had, he might be liable to indictment for perjury and his answer might be read in evidence against him. The plea was overruled. If this plea should turn out false in fact, though in general cases there would be a judgment in chief against the false pleader, yet in this case the court could not give that judgment, and so this would answer the defendant's purpose as well as if it was ever so fair, and the court could not then do right to the plaintiff. It might, perhaps, subject the defendant to a small penance, whereas, preventing legitimacy, it is of great consequence on the other side.

LORD HARDWICKE, L.C.—This appears a very plain case, in which the defendant may protect herself from making a discovery of her marriage. I am afraid that, if the court should overrule such a plea, it would be setting up the

A oath ex officio which then Parliament in the time of Charles I would in vain have taken away, if the party might come into this court for it. The general rule is that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law or the law of the land. Incest is undoubtedly punishable in ecclesiastical court, and such a crime is generally excepted out of the acts of pardon. [It was made a criminal offence by the B Punishment of Incest Act, 1908: 5 HALSBURY'S STATUTES (2nd Edn.) 949.] The ecclesiastical court has conusance of incest in two respects, diverso intuitu, first to judge of the legality of the marriage and to pronounce sentence of nullity, and, if they do so, proceeding lawfully and rightfully, it binds all parties, being the judgment of a court having proper jurisdiction of the cause. The other is to censure and punish persons guilty by ecclesiastical censure, as for fornication, C adultery, etc. Nor is it material what the nature of the punishment is. It is a punishment which must be performed or got rid of by commutation, which is like a fine.

Consider the present case. The discovery whether lawfully married takes in the whole, whether married in fact, and whether that marriage was lawful. The defendant has pleaded to it, which she may do, and in plea it is proper to bring in facts D and averments to support that plea, whereas a demurrer can be to nothing but what appears on the face of the bill, otherwise it would be a speaking demurrer. Here it was necessary to bring in such an averment that the testator was lawfully married before to her sister and had issue, which is a fact necessary to show, and that fact she has taken on herself to prove. The plea, therefore, is regular in form and good in substance. The objection to the plea is that, one of the parties E to the incestuous marriage being dead, there can be no proceeding afterward. I always took the distinction to be what is laid down in *Hinks* v. *Harris* (1), that by the law of the land the ecclesiastical court cannot proceed to judge of the marriage and to pronounce sentence of nullity after the death of one of the married parties, especially where there is issue, because it tends to bastardise the issue, and none after death of one of the parties to that marriage is to be bastardised, F but there is no rule of law standing to prevent either of the parties from punishment after death of the other. Suppose it was an offence of adultery or fornication, there is no rule of the civil or ecclesiastical law that after the death of one of the parties the survivor may not be punished for the offence. Undoubtedly they may, the court proceeding either ex officio, by office of the ecclesiastical judge, or by promotion of a proper informant.

G Why may not the ecclesiastical court do it in the case of incest, whether without the formality of marriage or attended with it? It is said that *Hinks* v. *Harris* (1) is no judicial determination in the point, and that all that was material before the court was the point of jurisdiction, which is true. But there was a plain difference. If the court held that the proceeding (and this is an answer to one part of the objection) even for the censure against the surviving party would have tended to H affect the legitimacy of the marriage or the issue, the Court of King's Bench would have stopped there, but they went on this, that it could not be given in evidence against the issue or the plaintiff claiming under that issue as was determined solemnly in the King's Bench on a long trial at Bar, directed out of this court in *Hillyard* v. *Grantham* (3), in which I was of counsel. In that cause during the life of the father and the mother there had been a proceeding against I both of them in the consistory court of Lincoln for living together in fornication, and sentence given against them. On the trial that sentence was offered in evidence to prove that they were not married. The whole court were of opinion that it could not be given in evidence, because, first, it was a criminal matter and could not be given in evidence in a civil cause, and next that it was res inter alios acta, and could not affect the issue. But they held that, if it had been a sentence on a question of the lawfulness of the marriage, it being a sentence of a court having proper jurisdiction, it might have been given in evidence. If, indeed,

there had been collusion, that might be shown on the part of the child to take off the force of it, because collusion affects everything; if no collusion, it binds all the world; but in a proceeding in a criminal way that could not be given in evidence. That was the distinction, the court went on in *Hinks* v. *Harris* (1). If there had not been that authority, I should not have doubted on the nature of the thing, but that the ecclesiastical court might have proceeded after the death of one party as well for incest as fornication, in which case there is no doubt they may.

Thus far as to the merits of the plea. Some collateral arguments have been used, that it is not in every case the party shall protect himself against relief in this court upon an allegation that it will subject him to a supposed crime. It is true that it never creates a defence against relief in this court. Therefore, in the case of usury or forgery, if a proof can be made of it, the court will let the cause go on to a hearing, but will not force the party by his own oath to subject himself to punishment for it. In a bill to inquire into the reality of deeds on suggestion of forgery, the court has entertained jurisdiction of the cause though it does not oblige the party to a discovery, but directs an issue to try whether forged. I remember a case where there was a deed of rentcharge suggested to be forged. It was tried twice at law and found for the deed. A bill was afterwards brought to set aside for forgery, and to have it delivered up to be cancelled. Lord King, L.C., notwithstanding the two trials, which had been in avowry and replevin, directed an issue whereon it was found forged, and, I remember, was cancelled and cut to pieces in court. There are several instances of that, so that the relief the party may have is no objection.

As to the objection from the consequence of allowing this plea if the defendant should fail in the proof of it, that would be an objection to the allowing any plea to a discovery though it would be no objection to a demurrer because that must abide by the bill, but all pleas must suggest a fact. It must go to a hearing, and, if the party does not prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery, but the court may direct an examination on interrogatories in order to supply that. The plea, therefore, ought to be allowed.

As to the demurrer of Sarah Brownsword, for that the plaintiff had not made out a title, the defendant's remainder being vested, and that her claim was on failure of that estate tail in John Brownsword, it was argued for the plaintiff that the limitations in the will must be taken to be executory devises, such as rested in suspense and contingency. On the events which happened the subsequent limitations could never arise, for both events must first happen, viz., John must die before twenty-one and without issue, whereas he attained twenty-one. Nor is there sufficient to warrant the turning this executory devise into a remainder. The testator meant to create a temporary trust to have continuance till John came of age and then that it should vest absolutely in him, or, if he died before twenty-one leaving issue, then it should go to that issue, so that it is to be taken distributively. This construction has been made in similar cases, viz., that both events of dying without issue and before twenty-one must happen before the contingent devise over takes place: see Eq. Cas. Ab. 188, and *Collenson* v. *Wright* (4). On any other construction the testator has omitted (what he never could intend to do) the providing for the event of John's dying under age leaving issue.

LORD HARDWICKE, L.C.—As this is a question upon the legal title to an estate on the construction of a will, if there was any doubt, I should not determine it on demurrer, but would, notwithstanding the inclination of my opinion might be in favour of defendant, overrule the demurrer without prejudice to the defendant's insisting on the same matters by way of answer so that it might more fully come before the court at the hearing. This the court sometimes does on the construction of wills. But if the opinion of the court is that as on the face of the

A bill the plaintiff has no title, and the will is set forth verbatim in the bill, it is just and more for the benefit of the parties to cut it short on the demurrer since it must be still determined on the same matters as are before the court on the demurrer.

In these cases of wills the governing rule of construction is the intent of the testator, which the court is to find out by his words and construe conformably B thereto, so far as it is possible consistently with the rules of law. The intent here was plain. Here were two children which the testator considered as his own: whether legitimate or not, I enter not into the question. On this demurrer I must take them to be legitimate. He had a mind to make a provision for them and the material point is that it is a limitation to them in tail, and if their issue failed he intended plainly to give it over to the other collateral branches of his family C and for want of such issue to his own right heirs for ever. The question is whether I can by construction, or on the strict literal meaning of the words, let in the right heirs of the testator so as to defeat all the subsequent limitations. This would be plainly contrary to his intent, but if the force of the words is such that the intent cannot be complied with, the rule of law must take place.

It is said that he has given nothing over but on the contingency of John's dying D without issue under age. Consider what necessity there is from the words to construe it in that manner which would be to defeat his intent. Having first given the whole legal fee to trustees and their heirs, he did not intend that either of these two children should have anything vested till twenty-one or the having issue, and then to have an estate-tail. Consequently, as soon as John attained twenty-one, or had issue though he died before twenty-one, that defeated and E determined the estate in law given to the trustees and vested a fee tail in him. He did attain twenty-one, and, therefore, had an entail as he would if he had died before twenty-one but had issue. Then the construction could not be, as insisted for the plaintiff, as with a double aspect—if he attained twenty-one then to vest in him an estate, or if he died before leaving issue, then to give it to that issue. That is not the construction of the will, but it is to give an estate tail in either F event. So that such issue would take as heir of the body of his father an estate tail from him in whom in point of law it vested, which estate would defeat the fee in the trustees. As to the subsequent words, if the court is compelled to make the construction the plaintiff insists on, the court will do it, but in the construction of wills the court has construed the words conformably to the intent of the testator as much as possible, ranging in a different order and transposing them to comply G therewith. There is no necessity to do either in this case or to supply material words, but there is a plain natural construction upon these words, viz., if John shall happen to die before twenty-one, and also shall happen to die without issue, which construction plainly makes the dying without issue to go through the whole, and fully answers the intent which was in that manner. Had the first devise been to John and his heirs, this construction, I believe, could not be made, for where H there is such a contingent limitation, I do not know that the court has changed "heirs" into "heirs of the body" to make it so throughout.

Much stronger constructions have been made than this in devises; *Spalding* v. *Spalding* (5) and other cases in CROKE, as in a devise to one and his heirs and if he should die before twenty-one or without issue then over, the court has said it was not the intent to disinherit the issue, and, therefore, "or" should be con- I strued as "and." If the first limitation had been in tail, there would be no occasion to resort to that, but the court would have made the construction I do now, viz., if he dies without issue before twenty-one, then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder, because he had made his original devise capable of a proper remainder in which case the court will always construe it a remainder. An estate tail is capable of a remainder, and it is natural to expect a remainder after it. It is contrary to his intent to let in this remainder to the

right heirs to defeat all the intermediate limitations to his family. This is the intent of testator, and well warranted by an easy construction of the words of the will. The demurrer, therefore, must be allowed.

Demurrer allowed.

HERLAKENDEN'S CASE

[Court of Queen's Bench (Sir Christopher Wray, C.J., and other judges), Easter Term, 1589]

[Reported 4 Co. Rep. 62 a; 76 E.R. 1025]

Landlord and Tenant—Timber—Rights of lessee—Special interest while trees annexed to demised property—Gift of trees to third party by lessor during lease—Validity—Right of lessee to take timber to repair house –Right to fallen timber.

When a lessor grants a lease for life or for years the lessee has a special interest or property in the trees, being timber, as things annexed to the land, so long as they are annexed to it, but, if the lessee or any other person severs them from the land, the property and interest of the lessee is thereby determined, and the lessor may take them as things which are parcel of his inheritance.

If during the continuance of a lease the lessor gives to a third party the trees on the demised property, and then the lessee dies, the donee cannot take the trees because at the time of the gift the lessee had the property in the trees as annexed to the land.

If a demised house falls as the result of tempest or other act of God, the lessee of the property for life or years has a special interest to take timber growing on the property to rebuild the house, but, if the lessee pulls down the house, the lessor may take the timber as a thing which is parcel of his inheritance and one in which the interest of the lessee is determined, notwithstanding that he may have an action for waste.

If timber trees are blown down by the wind, they are the property of the lessor, for they are parcel of his inheritance, and not that of the lessee, but, if they be dotards without any timber in them, the lessee shall have them.

Landlord and Tenant—Waste—Glass—Glass in windows—Part of demised house —Wainscot—Removal by lessee.

Damage to glass in windows may be waste, for it is part of the demised house and descends as parcel of the inheritance to the heir. And removal by the lessee of wainscot, however fastened to the house, renders the lessee punishable for waste.

Notes. Followed: *Bowles's Case* (1615), 11 Co. Rep. 79 b. Considered: *Abraham* v. *Bubb* (1680), 2 Freem. Ch. 53. Applied: *Williams* v. *Williams* (1808), 15 *Ves.* 419; *Channon* v. *Patch* (1826), 5 B. & C. 897; *Berriman* v. *Peacock* (1832), 9 Bing. 384. Considered: *Boydell* v. *McMichael* (1834), 3 Tyr. 974; *Eastern Construction Co.* v. *National Trust Co. and Schmidt*, [1914] A.C. 197. Referred to: *Rowles* v. *Mason* (1612), 2 Brownl. 88, 192; *Liford's Case* (1615), 11 Co. Rep. 46 b; *Squier* v. *Mayer* (1701), 2 Freem. Ch. 248; *Cave* v. *Cave* (1705), 2 Vern. 508; *Bullythorpe* v. *Turner* (1744), Willes, 475; *Elwes* v. *Maw*, [1775–1802] All E.R.Rep. 320; *Re De Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523.

As to a tenant's right to timber, see 23 Halsbury's Laws (3rd Edn.) 500–503, and cases there cited.

A Cases referred to:

(1) *Sir Moyle Finch's Case* (1606), 6 Co. Rep. 63 a.
(2) *Dauntsey* v. *Southwell* (1560), 2 Dyer, 184 a.
(3) *Mervyn* v. *Lyds* (1553), 1 Dyer, 90 a; 73 E.R. 195; 2 Digest (Repl.) 121, *895.*
(4) *Warner* v. *Fleetwood* (1600), cited in 4 Co. Rep. 64 a; 31 Digest (Repl.) 210, *3426.*

B **Action for Trespass** brought by Robert Ivy against Roger Herlakenden for breaking his close, 380 acres parcel of Colme Park in Colme in the county of Essex, and cutting down 300 oaks, 300 ashes, 300 maples, and 100 beeches there growing, and carrying away 1,000 loads of wood and underwood.

Edward Earl of Oxford was seised of Colme Park in Essex in fee, and in 1574 he leased to Thomas Barefoot, Thomas Luter and John Collins, the said park (except C the trees in the declaration mentioned) for twenty-one years. John Collins assigned his interest to Anthony Luter, and afterwards the earl sold to the said Barefoot, Luter and Luter the trees aforesaid, who on July 15, 1583, leased the said 380 acres of land and pasture, parcel of the park aforesaid (upon which the trees aforesaid grew) to one John Bragge for eleven years. In August, 1583, Barefoot, Luter and Luter sold the trees to the defendant. In 1584 Bragge assigned his interest to the D plaintiff. Afterwards the defendant cut down the trees, and the question was whether this cutting down was lawful or not.

Fuller and *Tanfield* for the plaintiff.
Egerton and *Coke* for the defendant.

The point, states **SIR EDWARD COKE** in his report of the case, was, when a man E leases his land for years excepting the wood and afterwards the lessor grants the wood to the lessee, whether the wood is so united again to the land, that by the lease of the land the wood shall pass as a thing annexed to it or if the wood remains as an interest distinct and severed from the land so that by the lease of the land it shall not pass to the lessee.

In this case, divers points were resolved: (1) When a man makes a lease for F life or years the lessee has but a special interest or property in the trees, being timber, as things annexed to the land, so long as they are annexed to it, but, if the lessee or any other severs them from the land, the property and interest of the lessee is thereby determined, and the lessor may take them as things which are parcel of his inheritance in which the interest of the lessee is determined. In an action of waste for cutting down of trees against a lessee for life or years, the writ says ad G exhæredationem and it would be absurd that the lessee, who has but a particular interest in the land, should have an absolute property in anything which was parcel of the inheritance. At common law, if a tenant in dower or tenant by the curtesy cut down trees, he in reversion might take them, yet their estate is as high as lessee for life, but the lessor should not have an action of waste at the common law against the lessee because it was his own act, and it was his folly to make a lease to him H who ought to do him fealty, and yet will commit waste. It was also his folly that in his lease he would not provide by condition or covenant that he should not commit waste or to prevent it by exception. If I lease my land for life and afterwards give the trees, and then the lessee dies, yet the donee cannot take them, as it is held per totam curiam in 21 Hen. 6, 46 B. because at the time of the gift the lessee had the property in them as annexed to the land.

I Sir Christopher Wray, C.J., said that a case between Moyle Finch, Esq., and Madam Finch, his mother, was now lately referred to him and Sir Roger Manwood, C.B. [see *Sir Moyle Finch's Case* (1), 6 Co. Rep. 63 a], which in effect was that Madam Finch had an estate for life in certain land without impeachment of waste, Moyle Finch had the inheritance expectant, and Madam Finch cut down divers trees growing upon the said land, and the question was whether Moyle might lawfully take the trees, or if they of right belonged to his mother. On conference had with divers other justices, they resolved, (i) that, if the said estate had been made for life without any such clause of without impeachment of waste, without

question Moyle should have the trees because they were parcel of his inheritance, and the interest which the tenant for life had in the trees was by the severance from the land determined, because she had them as things annexed to the land; (ii) in the same case it was resolved that the said clause of without impeachment of waste gave the tenant for life no greater interest in the trees than she had by the demise of the land, but it should serve only that she should not be impeached in any action of waste either to recover damages or the place wasted, as if I grant to one that he shall not be impeached for cutting of all my trees in such woods, it shall excuse him in any action brought against him for the cutting, but notwithstanding that the property and interest remains in me, for no property or interest is thereby given him. So if a man disseises me of my land, or dispossesses me of my goods, and I release to him all actions, yet I may enter into my land or take my goods, for the discharge of my action is no bar of my right. Therewith agrees Litt., c. Releases 115. All this was said and reported by Sir C. Wray: vide 27 Hen. 6, Wast. 8, where it is said that, if a man leases land absque impetitione vasti, and a stranger cuts down trees, and the lessee brings an action of trespass, he shall not recover damages for the value of the trees because the property is to him in the reversion, wherefore the lessee shall recover but for the cropping and breaking of the close. And it was said that, if tenant in tail after possibility of issue extinct fells the trees, the lessor shall have them, for inasmuch as he has but a particular estate for life in the land he cannot have an absolute interest in the trees, but he shall not be punished in waste, because his original estate is not within the Statute of Gloucester, c. 5.

(2) It was resolved that, if the house falls by tempest or other act of God, the lessee for life, or lessee for years, has a special interest to take the timber to build the house again if he will for his habitation, but if the lessee pulls down the house, the lessor may take the timber as a thing which is parcel of his inheritance and one in which the interest of the lessee is determined, as in case of trees, and for the same reason, notwithstanding he may have an action of waste, and recover treble damages: vide 44 Edw. 3, 5 and 6, and 44; 29 Edw. 3, 42; 2 Hen. 7, 14, per Brian; 10 Hen. 7, 2; 13 Hen. 7, 9; 21 Edw. 4, 52; *Mervyn* v. *Lyds* (3); *Dauntsey* v. *Southwell* (2).

(3) It was resolved, that if trees being timber are blown down by the wind, the lessor shall have them (for they are parcel of his inheritance) and not the tenant for life or tenant for years, but if they be dotards without any timber in them, the tenant for life or tenant for years shall have them: vide 40 Ass. 22, that guardian in chivalry shall not have windfalls, and so the quære in 7 Hen. 6, 38, well satisfied.

(4) The point was, when the earl leased the land for years excepting the trees, by which they were severed from the possession of the land during the term, and afterwards the lessor granted the trees to the lessee, whether now they be reunited to the possession of the land so that when the term ended the lessor should have them again as things annexed to the land. It was resolved that the lessee had in judgment of law an absolute and divided property in the trees so that by the lease of the land they should not pass, and, therefore, this difference was taken. If I enfeoff you of my land (except the trees) to have and to hold to you and your heirs, now the trees in property are divided from the land although in facto they remain annexed to the land, for if one cuts them down and carries them away it is not felony. Therefore, in such a case, if the feoffor grants the trees to the feoffee, they are re-united as well in property as they are de facto, and the heir of the feoffee shall have them and not the executors, for the feoffee had absolute ownership in both, so that it is not any prejudice but rather a benefit to him that they are reunited to the land. But in the case at Bar he had but a term for years in the land, so that he had not equality in ownership in both, and it would be a prejudice to him that during the term he could not fell them, but should be punished in waste, and after the term should lose them, and it would be against reason that the lessor should against his own grant have them again. It was also said that Barefoot, Luter and Luter were tenants in common of the land, and they were joint tenants

of the trees, and so their interest divers and of several qualities, and, therefore, there could not be a union between them.

In a note subscribed to this report Sir Edward Coke mentions a case in the Common Pleas in which it was adjudged that waste might be committed in glass annexed to windows, for it was parcel of the house, and should descend as parcel of the inheritance to the heir and the executors should not have them. Although the lessee himself at his own cost put the glass in the windows, yet it being once parcel of the house he could not take it away or waste it, but he should be punished in waste. On this judgment a writ of error was brought in the King's Bench, and there the judgment was affirmed. Note also, in *Warner* v. *Fleetwood* (4) in the Common Pleas in 1599 (? 1600) it was resolved per totam curiam that glass annexed to windows by nails or in other manner by the lessor or by the lessee could not be removed by the lessee, for without glass it was no perfect house. By lease or grant of the house it should pass as parcel thereof, and the heir should have it, and not the executors. Peradventure great part of the costs of the house consists of glass which, if they be open to tempests and rain, waste and putrefaction of the timber of the house would follow, which agrees with the judgment given before. It was likewise then resolved that wainscot be it annexed to the house by the lessor or by the lessee, is parcel of the house, and there is no difference in law if it be fastened by great nails or little nails, or by screws, or irons put through the posts or walls (as have been invented of late time), but if the wainscot is by any of the said ways or by any other fastened to the posts or walls of the house, the lessee cannot remove it. If he does, he is punishable in an action of waste, for it is parcel of the house, and so by the lease or grant of the house (in the same manner as the ceiling and plastering of the house) it shall pass as parcel of it.

BORASTON'S CASE

[Court of Queen's Bench (Sir Christopher Wray, C.J., and other judges), Hilary Term, 1587]

[Reported 3 Co. Rep. 16 a; 76 E.R. 664]

Will—Vesting—Devise taking effect on devisee attaining 21*—Prior interest pending attainment—Vesting of gift on determination of prior interest.*

A future interest created by a will, though it is expressed to take effect on a contingent event, as where real estate is devised to a devisee in fee when he attains a specified age and a prior interest is limited to endure pending his attainment of that age, may be construed to be a vested interest actually taking effect on the determination of the previous interest.

Notes. Applied: *Roberts* v. *Roberts* (1613), 2 Bulst. 123; *Doe d. Wheedon* v. *Lea* (1789), 3 *Term Rep.* 41; *Jackson* v. *Marjoribanks* (1841), 12 Sim. 93; *Parkin* v. *Knight* (1846), 15 Sim. 83; *Hepworth* v. *Scale* (1855), 25 L.T.O.S. 328; *Re Radford, Jones* v. *Radford* (1918), 62 Sol. Jo. 604. Considered: *Re Blackwell, Blackwell* v. *Blackwell*, [1925] All E.R.Rep. 498. Referred to: *Wellock* v. *Hammond* (1590), Cro. Eliz. 204; *Lovies' Case* (1614), 10 Co, Rep. 78 a; *Blamford* v. *Blamford* (1615), 3 Bulst. 98; *Havergil* v. *Hare* (1616), 3 Bulst. 250; *Sheriff* v. *Wrotham* (1618) Cro. Jac. 509; *Pells* v. *Brown* (1620), Cro. Jac. 590; *Napper* v. *Sanders* (1631), Hut. 118; *Blunket* v. *Holmes* (1661), 1 Keb. 119; *Petty* v. *Goddard* (1662), O.Bridg. 35; *Gardner* v. *Sheldon* (1671), 2 Keb. 781; *Taylor* v. *Biddall* (1679) 2 Mod. Rep. 289; *Coates* v. *Needham* (1688), 2 Vern. 65; *Scattergood* v. *Edge* (1699), 12 Mod. Rep. 278; *Manfield* v. *Dugard* (1713), Gilb. Ch. 36; *Bacon*

v. *Clerk* (1718), Prec. Ch. 500; *Pappillion* v. *Voice* (1728), Kel.W. 27; *Moone d. Fagge* v. *Heaseman* (1739), Willes, 138; *Doe d. Morris* v. *Underdown* (1741), Willes, 293; *Parkhurst* v. *Smith* (1741), Willes, 327; *Newcoman* v. *Bethlem Hospital* (1741), Amb. App. 785; *Bagshaw* v. *Spencer* (1748), 1 Ves. Sen. 148; *A.-G.* v. *Duplessis* (1752), Park. 144; *Tunstall* v. *Brachen* (1753), Amb. 167; *Goss* v. *Nelson* (1757), 1 Burr. 226; *Goodtitle d. Hayward* v. *Whitby* (1757), 1 Keny 506; *Carleton d. Griffin* v. *Griffin* (1758), 2 Keny. 281; *Booth* v. *Booth* (1799), 4 Ves. 399; *Hanson* v. *Graham*, [1775–1802] All E.R.Rep. 433; *Stanley* v. *Stanley* (1809), 16 Ves. 491; *Bull* v. *Pritchard* (1826), 1 Russ. 213; *Duffield* v. *Duffield* (1829), 1 Dow. & Cl. 268; [1824–34] All E.R.Rep. 694. *Vawdrey* v. *Geddes* (1830), Taml. 361; *Doe d. Cadogan* v. *Ewart* (1838), 7 Ad. & El. 636; *Doe d. Dolley* v. *Ward* (1839), 9 Ad. & El. 582; *Newman* v. *Newman* (1839), 10 Sim. 51; *Leeming* v. *Sharratt*, [1835–42] All E.R.Rep. 458; *Phipps* v. *Ackers* (1842), post p. 381; *Tapscott* v. *Newcombe* (1842), 6 Jur. 755; *Baynes* v. *Prevost* (1844), 8 Jur. 506; *Milroy* v. *Milroy* (1844), 13 L.J.Ch. 266; *Mortimer* v. *Hartley* (1847), 11 Jur. 582; *James* v. *Wynford* (1852), 1 Sm. & G. 40; *Walker* v. *Mower* (1852), 16 Beav. 365; *Ludlow* v. *Stevenson* (1854), 23 L.T.O.S. 294; *Alexander* v. *Alexander* (1855), 16 C.B. 59; *Browne* v. *Browne* (1857), 3 Sm. & G. 568; *Holmes* v. *Prescott* (1864), 3 New Rep. 559; *Re Mottram* (1864), 10 L.T. 866; *Re Gregson's Trusts* (1864), 2 Hem. & M. 504 ([1861–73] All E.R.Rep. 967); *Richardson* v. *Power* (1865), 19 C.B.N.S. 780; *Locke* v. *Lambe* (1867), L.R. 4 Eq. 372; *Andrew* v. *Andrew* (1875), 24 W.R. 349; *Patching* v. *Barnett* (1880), 49 L.J.Ch. 665; *Pearks* v. *Moseley* (1880), 5 App. Cas. 714; *Re Wrey, Stuart* v. *Wrey* (1885), 30 Ch.D. 507.

As to the rule in *Boraston's Case*, see 39 Halsbury's Laws (3rd Edn.) 1124–1127. For cases see 49 Digest (Repl.) 972–979.

Cases referred to:

(1) *Colthirst* v. *Bejushin* (1550), 1 Plowd. 21; 75 E.R. 33; 31 Digest (Repl.) 64, *2208*.

(2) *Wellock* v. *Hammond* (1690), Cro. Eliz. 204.

(3) *Agar* v. *Pool* (1580), 3 Dyer, 371, pl. 5.

Bill for Ejectment brought by Richard Hynde, the plaintiff, against William Ambrye, the defendant, relating to lands in Aldenham in the county of Hertford, on a lease made by Thomas Brand and Constance, his wife, and William Davies and Margaret, his wife, to the plaintiff for seven years. The defendant pleaded not guilty, and the jury gave a special verdict to this effect.

Thomas Boraston was seised in fee of the lands aforesaid and held them in socage. He had issue Humphrey Boraston, his elder son, and Henry Boraston, his younger son. Humphrey had issue the said Constance, wife of Thomas Brand, and Margaret, wife of William Davies; and Henry Boraston had issue Hugh. By his will, dated Aug. 12, 1559, Thomas Boraston devised the said lands in these words:

> "I give to Thomas Amery and Amphillis, his wife, all that my upper part of my close called Redding for eight years next after my decease. And that the said Thomas Amery, nor his assigns, shall, during the said term, fell any of the said wood or timber in or upon the said upper part, but shall preserve the woods to the use and behalf of the heir in remainder: and after the term of the said eight years, the said upper part to remain to my executors until such time as Hugh Boraston shall accomplish his full age of twenty-one years, the mean profits to be employed by my executors towards the performance of this my last will and testament, and when the said Hugh shall come to his age of twenty-one years, then I will he shall enjoy the said upper part to him and to his heirs for ever."

Thomas Boraston died on Aug. 14, 1559, and Hugh died before he attained the age of twenty-one years, about the age of nine years. Philip Boraston was brother and heir of Hugh Boraston, and after the expiration of the terms of Thomas

A Amery and Amphillis his wife and of the executors, he entered into the lands and demised them to William Ambrye, by force whereof he was possessed, upon whom the lessors of the plaintiff in right of their wives entered into the lands. By indenture he demised to the plaintiff, prout in the declaration, by force whereof he was possessed until the defendant, by the commandment of the said Phillip, entered upon him. The question for the opinion of the court was whether the entry of
B the defendant was lawful or not.

Egerton, *Thomas Forster* and others, for the plaintiff, argued that no remainder was vested in Hugh Boraston until he attained the age of twenty-one years. In the meantime the lands descended to the daughters of the elder son, who were general heirs to the devisor, and as Hugh never attained twenty-one, for this cause the land never vested in him, but remained in the heirs general. In proof
C that the remainder did not vest in Hugh before twenty-one, it appeared by the words of the will that he should not have it till his said age of twenty-one years, for the words were:

> "and when the said Hugh shall come to his age of twenty-one years, then I will he shall enjoy the said upper part to him and to his heirs for ever."

D So it fully appeared that the devise to Hugh depended on a contingency, that is to say, on the attainment of Hugh's full age of twenty-one years. That ought to precede before the remainder could begin, and whether Hugh would come to that age was so uncertain, that no man could know. If Thomas Boraston had made a lease till Hugh attained his full age, Hugh then being of the age of nine years, the lessee should not have an absolute lease for twelve years, for, if Hugh should
E die before his full age, the lease would be ended, quod fuit concessum per totam curiam.

It was also said that when a particular estate (which supported a remainder) might determine before the remainder began, there the remainder would not presently vest, but would depend in contingency, as if one made a lease to J.S. for his life and after the death of J.D. to remain to another in fee, this remainder
F depended in contingency, for, if J.S. died before J.D. the particular estate was determined before the remainder could begin. On the same reason it was adjudged in *Colthirst* v. *Bejushin* (1), where the case in effect was that a lease was made to A. for life, remainder to B. for life, and if B. died before A. that it should remain to C. for life, that was a good remainder on a contingency if A. survived B. That case was all one in reason with the common case which was often agreed in
G our books. A lease was made to one for life, remainder to the right heirs of J.S., which remainder was good upon a contingency, that is to say, if the lessee for life survived J.S. otherwise not. For the same reason, if a man having issue a son of the age of nine years, made a lease until his son should attain to his full age, and after he should come to his full age, that it should remain over to another in fee, nothing vested (without question, presently) in him in remainder, which was
H granted by the whole court. It was said by the plaintiff's counsel that such remainder was utterly void and yet might take effect; for inasmuch as the remainder ought to pass out of the lessor presently, either to him in remainder, or to be in abeyance and custody of the law, and a freehold could not in such case be in abeyance, for this cause the remainder was utterly void as if a man made a lease to A. for twenty-one years, if B. lived so long and after the death of B. that it
I should remain over in fee, that remainder was void. So, if a lease for years be made, remainder to the right heirs of J.S., that remainder was void, quod fuit concessum per totam curiam.

Also it was said, that when a remainder was limited to take effect on the doing of an act, which act would be the determination of the particular estate, yet if the act depended on a casualty and mere uncertainty whether it would ever happen or not, there also the remainder depended in contingency, and would not presently vest, as if A. made a feoffment to the use of B. until C. came from Rome to England, and after such return from Rome to England, to remain over in fee,

that remainder depended in contingency, for it was uncertain whether C. would ever return to England or not, which was granted by the whole court.

Coke and others, for the defendant, contended that the remainder vested in Hugh presently by the death of the devisor, and by his death without issue the land descended to Philip his brother, who leased to the defendant. For it was said that, although Hugh died before his full age, yet the interest and term of the executors did not cease because in wills the intent of the devisor was to be considered, and when he devised his lands to his executors until Hugh, his son, should come to his full age for payment of his debts and to perform his will, it was to be intended that he had computed that the profits to be taken of his lands by his executors during the minority of his son (which was for the space of twelve years) would suffice to pay his debts and perform his will, and that he did not intend it should determine by the death of his son, for then the means which he had prescribed to satisfy his debts and perform his will would be defeated, and in consequence his debts would remain unsatisfied and his will unperformed. Therefore, this case of a devise differed from a lease or a grant made in the like manner. For the devisor was intended to be inops consilii, and, therefore, the law would be his counsel and according to his intent appearing in his will, would supply the defect of his words, and, therefore, where the devisor said "until such time as Hugh Boraston shall accomplish his full age of twenty-one years," the law, which favoured the perfomance of wills according to the intent of the devisor, in construction would make it "until such time as Hugh Boraston should have come to his full age of twenty-one years," for when the devisor by apt words and terms might have by good advice made his will good and sufficient in law, according to his true intent, there, although the devisor being hindered by sickness or for want of good advice, made his will in a disordered manner and in barbarous and unfit words, the law in such case would reduce his words into good order and sentence his unfit words to words sufficient in law according to his intent which appeared by his own words. In *Wellock* v. *Hammond* (2) in trespass, upon not guilty pleaded, the case upon special verdict was this : A copyholder in fee of land descendible in borough english, having three sons and one daughter, devised his land to his eldest son, paying to his daughter and to each of his other sons 40s. within two years after his death. The devisor made a surrender according to the custom of the manor to the use of his will and died. The eldest son was admitted, and did not pay the money within two years; the youngest son entered into the land, and it was adjudged that his entry was lawful. In that case two points were resolved : (i) Although the yearly profits of the lands for two years exceeded the money to be paid to his sons and daughter, yet the eldest son had a fee simple, for the recompense and consideration, although it be not to the value of the land, in case of a will makes it in construction a fee simple. In the books of 4 Edw. 6, Br. Estates 78, and 29 Hen. 8, Br. Testament 18, and *Agar* v. *Pool* (3), no mention was made of the value of the land, no more than in the case of bargain and sale of land in 4 Edw. 6, Estates 78, yet the fee simple of the use would pass. (ii) It was resolved, although in the case of a will this word "paying" makes a condition, yet in that case the law would construe this unapt word "paying" to a limitation, for, if it should be a condition, then it would descend upon the eldest son and it would be at his pleasure whether his brothers or sister should be paid or not. Therefore, it was adjudged that in that case the law would construe it for a limitation of which the youngest son in borough english might take advantage, and to amount to as much as if he had made the devise of the land to his eldest son till he shall make default of payment, etc., and so the doubt in 3 DYER 316 b, pl. 5, moved by MANWOOD is well resolved.

Upon which it was concluded in the case at Bar by the defendant's counsel that the executors had a good term for twelve years, which was not determined by the death of Hugh Boraston, which was granted by the whole court. The general rule put by the counsel of the other side was well agreed that the remainder ought to commence in possession when the particular estate ends, as well in wills as in grants, and there cannot be a mean time between them, but that does not concern

A the case at Bar for here, inasmuch as the term did not end by the death of Hugh Boraston, the remainder did begin in possession at the end of the term. As to the uncertainty, it was said that the case at Bar is no other in effect but that a man devises his lands to his executors (for the payment of his debts) until his son shall or should have come to his full age (of twenty-one years), the remainder to his son in fee, for although these are adverbs of time, "when," and "then" yet B they do not amount to make anything to precede the settling of the remainder, no more than in the common case. A man leases land for life or years, and after the decease of the lessee or the term ended the remainder to another, yet it shall remain presently, for when these adverbs refer to a thing, which must of necessity happen, there they make no contingency. It is certain that every man must die for statutum est hominibus semel mori, and every term will end, for tempus edax C rerum. In the case at Bar it is certain that Hugh would or might have accomplished his age of twenty-one years, which are, in this case of a will, all one in construction of law. So that these adverbs "then" and "when" in our case, are demonstrations of the time when the remainder to Hugh shall take effect in possession, as in the cases of a lease for life and lease for years, and not when the remainder shall vest, quod fuit concessum per totam curiam.

D *Judgment for defendant.*

E

NOTE

PHIPPS *v.* ACKERS AND OTHERS

F [House of Lords (Lord Lynhurst, L.C., Lord Brougham and Lord Campbell), August 18, 31, 1835, May 10, June 30, August 11, 1842]

[Reported 4 Man. & G. 1107; 9 Cl. & Fin. 583; 5 Scott, N.R. 955; 6 Jur. 745; 134 E.R. 453]

Will—Vesting—Devise taking effect on devisee attaining 21*—Vesting of gift on death of testator.*

G A testator gave his real and personal estate to trustees. As to his lands at W., which he held in fee simple, he directed that the trustees should stand seised thereof in trust to convey the same to G.H.A. "when and as soon as he should attain his age of 21 years." If G.H.A. should die before he attained that age without leaving issue, then the lands at W. given and devised to him were to sink into the residue of the testator's real and personal estate. He H gave the residue to J.C. At the testator's death G.H.A. was 12 years of age.

Held: an equitable estate in fee in the lands at W. vested in G.H.A. immediately on the testator's death, this being liable to be divested in the event of his dying under 21 without leaving issue.

Notes. Considered: *Festing* v. *Allen* (1843), 12 M. & W. 279; *Egerton* v. *Earl* I *Brownlow* [1843–60] All E.R.Rep. 970; *Browne* v. *Browne* (1857), 3 Sm. & G. 568. Applied: *Re Mottram* (1864), 10 L.T. 866. Followed: *Whitter* v. *Bremridge* (1866), L.R. 2 Eq. 736. Applied: *Finch* v. *Lane* (1870), L.R. 10 Eq. 501. Considered: *Williams* v. *Haythorne*, *Williams* v. *Williams* (1871), 6 Ch. App. 782. Applied *Re Radford*, *Jones* v. *Radford* (1918), 62 Sol. Jo. 604. Distinguished: *Re Astor*, *Astor* v. *Adams* (1921), 90 L.J.Ch. 499. Applied: *Re Blackwell*, *Blackwell* v. *Blackwell*, [1926] All E.R.Rep. 498; *Re Heath*, *Public Trustee* v. *Heath*, [1935] All E.R.Rep. 677; *Re Kilpatrick's Policies Trusts*, *Kilpatrick* v. *I.R.Comrs.*, [1966] 2 All E.R. 149. Referred to: *Jackson* v. *Marjoribanks* (1841), 12 Sim. 93;

Bull v. *Pritchard* (1847), 5 Hare, 567; *Boulton* v. *Beard* (1853), 3 De G.M. & G. 608; *Pearson* v. *Rutter* (1853), 3 De G.M. & G. 398; *Alexander* v. *Alexander* (1855), 16 C.B. 59; *Underwood* v. *Wing* (1855), 4 De G.M. & G. 633; *Smith* v. *Spencer* (1856), 6 De G.M. & G. 631; *Holmes* v. *Prescott* (1864), 33 L.J.Ch. 264; *Andrew* v. *Andrew* (1875), 1 Ch.D. 410; *Re Orlebar's Settlement Trusts* (1875), L.R. 20 Eq. 711; *Re Francis, Francis* v. *Francis*, [1905] 2 Ch. 295.

As to vesting of remainders, see 39 Halsbury's Laws (3rd Edn.) 1124–1127. For cases see 49 Digest (Repl.) 967 et seq.

Cases referred to:

(1) *Goodtitle d. Hayward* v. *Whitby* (1757), 1 Burr. 228; 1 Keny. 506; 97 E.R. 287; 49 Digest (Repl.) 979, *9188*.

(2) *Boraston's Case* (1587), ante p. 377; 3 Co. Rep. 16 a; 76 E.R. 664; 49 Digest (Repl.) 972, *9142*.

(3) *Manfield* v. *Dugard* (1713), Gilb. Ch. 36; 25 E.R. 26; sub nom. *Mansfield* v. *Dugard*, 1 Eq. Cas. Abr. 195; sub nom. *Mansfield* v. *Mansfield*, 2 Eq. Cas. Abr. 363, L.C.; 49 Digest (Repl.) 973, *9145*.

(4) *Edwards* v. *Hammond* (1684), 3 Lev. 132; 1 Bos. & P. 324, n.; 83 E.R. 614; sub nom. *Stocker* v. *Edwards*, 2 Show. 398; 49 Digest (Repl.) 968, *9120*.

(5) *Bromfield* v. *Crowder* (1805), 1 Bos. & P.N.R. 313; 127 E.R. 483; affirmed (1811), cited in 14 East, at p. 604, H.L.; 49 Digest (Repl.) 974, *9156*.

(6) *Doe d. Hunt* v. *Moore* (1811), 14 East, 601; 104 E.R. 732; 49 Digest (Repl.) 974, *9158*.

(7) *Stanley* v. *Stanley* (1809), 16 Ves. 491; 33 E.R. 1071; 49 Digest (Repl.) 973, *9151*.

(8) *Ackers* v. *Phipps* (1835), 9 Bli.N.S. 430; 3 Cl. & Fin. 665; 5 E.R. 1353, H.L.; 49 Digest (Repl.) 975, *9162*.

(9) *Bullock* v. *Stones* (1754), 2 Ves. Sen. 521.

(10) *Genery* v. *Fitzgerald* (1822), Jac. 468; 37 E.R. 927, L.C.; 23 Digest (Repl.) 417, *4872*.

(11) *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372; 10 Bing. 140; 7 Bli.N.S. 202; 3 Moo. & S. 571; 6 E.R. 956, H.L.; 37 Digest (Repl.) 66, *78*.

(12) *Leonard Lovies's Case* (1613), 10 Co. Rep. 78 a; sub nom. *Lovice* v. *Goddard*, Moore, K.B. 772.

(13) *Walpole* v. *Lord Conway* (1740), Barn. Ch. 153; 27 E.R. 593, L.C.; 38 Digest (Repl.) 837, *498*.

(14) *Cunningham* v. *Moody* (1748), 1 Ves. Sen. 174; 27 E.R. 965; 38 Digest (Repl.) 837, *503*.

(15) *Doe d. Willis* v. *Martin* (1790), [1775–1802] All E.R.Rep. 343; 4 Term Rep. 39; 100 E.R. 882; 37 Digest (Repl.) 342, *859*.

(16) *Tomkins* v. *Tomkins* (1743), cited in 1 Burr. at p. 234; 2 Hov. Supp. 456; 97 E.R. 290, L.C.; 49 Digest (Repl.) *1214*.

(17) *Doe d. Wheedon* v. *Lea* (1789), 3 Term Rep. 41; 100 E.R. 445; 49 Digest (Repl.) 969, *9122*.

Also referred to in argument:

Johnson v. *Gabriel and Bellamy* (1558), Cro. Eliz. 122; 78 E.R. 380; sub nom. *Johnson and Bellamy's Case*, 2 Leon. 36; sub nom. *Grant's Case*, cited 10 Co. Rep. at p. 50 a; 49 Digest (Repl.) 968, *9119*.

Taylor v. *Bydall* (1678), 1 Freem.K.B. 243; 2 Mod. Rep. 289; 89 E.R. 173; sub. nom. *Anon.*, 1 Freem.K.B. 293; 49 Digest (Repl.) 741, *6936*.

Stephens v. *Stephen* (1736), Cas. temp. Talb. 228; 2 Barn.K.B. 375; 25 E.R. 751, L.C.; 37 Digest (Repl.) 55, *1*.

Gibson v. *Rogers* (1750), Amb. 93; 27 E.R. 58; sub nom. *Gibson* v. *Lord Montfort*, 1 Ves. Sen. 485, L.C.; 48 Digest (Repl.) 643, *6196*.

Doe d. Roake v. *Nowell* (1813), 1 M. & S. 327; affirmed sub nom. *Randoll* v. *Doe d. Roake* (1817), 5 Dow. 202; 3 E.R. 1302, H.L.; 49 Digest (Repl.) 974, *9159*.

A *Hanson* v. *Graham* (1801), [1775–1802] All E.R.Rep. 433; 6 Ves. 239; 31 E.R. 1030; 49 Digest (Repl.) 1021, *9557.*

Chambers v. *Brailsford* (1816), 2 Mer. 25; 19 Ves. 652; 34 E.R. 658, L.C.; 48 Digest (Repl.) 467, *4212.*

Lcake v. *Robinson*, [1814–23] All E.R.Rep. 363; 2 Mer. 363; 35 E.R. 979; 49 Digest (Repl.) 988, *9263.*

B *Duffield* v. *Elwes* (1826), 2 Sim. & St. 544; reversed sub nom. *Duffield* v. *Duffield* (1829), [1824–34] All E.R.Rep. 694; 3 Bli.N.S. 260; 1 Dow. & Cl. 268, 395; 4 E.R. 1334, H.L.; 49 Digest (Repl.) 969, *9124.*

Vawdry v. *Geddes* (1830), 1 Russ. & M. 203; Taml. 361; 8 L.J.O.S.Ch. 63; 39 E.R. 78; 49 Digest (Repl.) 1029, *9622.*

Jervoise v. *Duke of Northumberland* (1820), [1814–23] All E.R.Rep. 222; C 1 Jac. & W. 559; 37 E.R. 481, L.C.; 40 Digest (Repl.) 519, *301.*

Appeal by the plaintiff, Mrs. Sophia Phipps, in an action brought by her against the defendants, George Holland Ackers and others, for a declaration that the plaintiff was entitled under the will of James Ackers to certain rents and profits of messuages and lands in Cheshire.

D James Ackers, by his will dated April 13, 1822, gave and devised all his freehold, copyhold and leasehold messuages, lands and tenements, to trustees upon certain trusts therein declared, except the lands, hereditaments and premises thereinafter devised unto his godson, George Holland Ackers, as to which the will proceeded thus:

"And as to, for and concerning all my messuages, lands and premises E situate, lying and being at Wheelock, in the county of Chester, they my trustees shall stand seised and be possessed thereof in trust and to the intent and purpose to assign, convey and assure the same unto my godson George Holland Ackers eldest son of my nephew George Ackers when and so soon as he my said godson shall attain his age of twenty-one years; and also do and shall pay unto my said godson G. H. Ackers, the sum of F £7,000 at and upon his attaining his said age of twenty-one years. But in case my said godson, G. H. Ackers, shall depart this life before he attains the said age of twenty-one years without leaving issue of his body lawfully to be begotten then and in such case the said messuages, lands and premises in Wheelock aforesaid, hereinbefore given and devised to him, together with the said sum of £7,000 shall sink into and become part of the residue of my real and personal G estate and go according to the disposition thereof hereinafter expressed and contained."

The residue of the real and personal estate was then by the will given to James Coops.

The testator died in 1824, leaving G. H. Ackers, who was then about twelve H years of age and attained his age of twenty-one years in 1833. In 1831, Mrs. Phipps, the testator's heiress-at-law, filed a bill in Chancery against the acting trustee and G. H. Ackers and others, stating the will, and also, among other things, that the rents received by the trustee in respect of the Wheelock estate amounted to a considerable sum. The bill prayed that it might be declared that the plaintiff was entitled to the rents and profits of the messuages and lands at Wheelock I from the death of the testator until such time as the infant defendant, G. H. Ackers, should attain twenty-one years of age.

To that bill G. H. Ackers demurred for want of equity, and the Vice-Chancellor (SIR LANCELOT SHADWELL, V.-C.) allowed the demurrer. The plaintiff appealed.

West for the appellant.

Sir Charles Wetherell and *J. Russell* for the respondents.

LORD LYNDHURST, L.C., with the concurrence of the other peers present, proposed the following question for the opinion of the judges:

"A.B., being seised in fee simple of certain lands and hereditaments at W., by his will duly executed and attested for passing real estates by devise, gave all his real estates at W. to his godson, G.H.A., when and so soon as he should attain his age of twenty-one years, but if his said godson should die under the age of twenty-one years, then the testator directed that his estate at W. should sink into and form part of his residuary real estate, and by his said will he gave all the residue of his real estates to J.C., subject to various limitations and provisions affecting the same. The testator continued seised in fee simple of the lands and hereditaments at W. until his death, and he died without revoking or altering his will, leaving his godson G.H.A. an infant of the age of twelve years. The opinion of the judges is desired as to what estate G.H.A. took in the estate at W."

The further consideration of the case was postponed to give the judges time to consider the question.

June 30, 1842. **SIR NICHOLAS TINDAL, C.J.,** delivered the following opinion of the judges: In order to answer your Lordships' question, it is not necessary for us to say what would be the legal effect of a simple devise to A. and his heirs when or if he shall attain twenty-one, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining twenty-one as a condition precedent. In such a case MR. FEARNE may be right in the opinion found among his posthumous works, that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands. But whatever might be the true meaning of such a devise if it should occur by itself, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favour of some other person. The cases on this subject appear to be resolvable into two classes: first, those in which the courts have relied on the circumstance that the estate, prior to the attainment of the age of twenty-one, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle d. Hayward* v. *Whitby* (1), or for the benefit of some other persons to endure during the minority, as in *Boraston's Case* (2) (ante p. 377, and *Mansfield* v. *Dugard* (3), and, secondly, those cases in which the estates are given over in the event of the devisee dying under twenty-one, as in *Edwards* v. *Hammond* (4), *Bromfield* v. *Crowder* (5), and *Doe d. Hunt* v. *Moore* (6).

The first class of cases proceeds on the ground that the estate given to the devisee on his attaining twenty-one, is in fact only a remainder, taking effect in its natural order on the determination of the preceding estates, and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under twenty-one sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which, of course, gives him the immediate interest, subject only to the chance of its being devested on a future contingency.

Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory is a point which we need not discuss. It is sufficient to say that it clearly has been established and recognised as a settled rule of construction, not only in the courts below but also in your Lordships' House, and that rule appears to us clearly to govern the case put to us by your Lordships. In conformity with this rule, therefore, we beg leave to state that on the question put to us, we are of opinion that G.H.A., on the decease of the testator, took an estate in fee simple in the lands and hereditaments at W., subject to be divested in the event of his dying under twenty-one and without issue.

Aug. 11, 1842. **LORD LYNDHURST, L.C.**—This case arises out of the will of James Ackers. The testator, by his will, devised his estates to trustees, and with respect to the Wheelock estate, the estate in question, he directed that the trustees should stand seised and possessed of it in trust to convey and assure it to George Holland Ackers, his godson, when and so soon as he should attain the age of twenty-one years, but that if he should die under the age of twenty-one years without leaving issue of his body lawfully begotten, in that case the estate should form part of his residuary estates, which he devised to another person. The question is, under this devise, what estate George Holland Ackers took in the Wheelock estate?

The question was argued in the presence of the learned judges, but, as this is an equitable estate and, as your Lordships are, no doubt, aware, it forms no part of the duty of the judges to deliver opinions with respect to equitable estates, it became necessary to frame a question for their consideration in a different form, and accordingly the question put to the learned Judges was, in substance, this [HIS LORDSHIP read the question.] The object which your Lordships had in view was that the learned judges should review *Doe d. Hunt* v. *Moore* (6), and *Bromfield* v. *Crowder* (5), and other cases of that class. The judges, after consideration, unanimously pronounce as their opinion that George Holland Ackers took a vested estate in fee in the Wheelock estate, liable to be divested in the event of his dying under twenty-one without leaving lawful issue.

I am, for one, perfectly satisfied with that decision of the learned judges, and I have no doubt my noble and learned friends concur with me in that opinion. The only question, therefore, that remains to be considered is whether a different construction should be put on this will, which conveys an equitable estate, from that which the learned judges have put upon the will as applied to a legal estate, or, in other words, whether the direction to convey makes any difference with respect to the disposition of the property? I am clearly of opinion that it does not, and I agree entirely in what fell from SIR WILLIAM GRANT, M.R., in *Stanley* v. *Stanley* (7), that the right is not affected by the direction to convey, but that the conveyance must conform to the right, and that the will itself is an equitable conveyance until that is displaced by the legal conveyance which is directed to be made. I am of opinion, therefore, that in this case George Holland Ackers took an equitable vested estate in fee in the Wheelock estate, and that it was divested on his dying under the age of twenty-one years without leaving lawful issue. The consequence of this is that the judgment of the Vice-Chancellor must be affirmed.

LORD BROUGHAM—I entirely agree with the view which my noble and learned friend takes of this case, upon both the points, but it will be necessary for me to trouble your Lordships by going a little more particularly into it in consequence of what passed when the case was heard before me, and out of which arose the discussion of it before the learned judges.

After disposing of one of the two cases reversing the decree of the court below in 1835 [*Ackers* v. *Phipps* (8)], I was at first disposed to affirm the decree in the other, the case now before your Lordships. On looking more carefully into it, however, I came to the opinion that, if the decree was to be supported, it could not be rested upon the same ground as that on which I moved the reversal of the other decree, as the circumstances of the word "residue" and the words "other estates not disposed of," did not apply here, and the cases cited had no application, except the *File-cutter's Case* (*Bullock* v. *Stones* (9)), and LORD ELDON'S dicta in *Genery* v. *Fitzgerald* (10). I, therefore, arrived at the conclusion that, if the decree below was allowed to stand, it could only be rested upon the interest given to George Holland Ackers being an immediate vested interest, and not contingent, that it was an interest vesting instanter, but liable to be divested on the event happening of George Holland Ackers dying under twenty-one. I adverted to the doubts which had always been entertained in Westminster Hall upon *Doe d. Hunt* v. *Moore* (6), and the difficulty which I felt of reconciling it with other cases, and I stated my opinion that *Bromfield* v. *Crowder* (5) does not go so far as *Doe d. Hunt*

v. *Moore* (6), and is still more irreconcilable with the language used in deciding that case. On the whole, therefore, I recommended the postponement of the decision, and having the case re-argued with the assistance of the learned judges. It has accordingly been re-argued, and your Lordships have the opinion before you of the judges who have arrived at the conclusion that *Doe d. Hunt* v. *Moore* (6) was rightly decided, though they give no opinion as to what they might have held had the decision been recent, and the question were now for the first time before them. Indeed, by expressly stating that they do not feel called on to inquire whether or not that case was satisfactorily decided, they seem to intimate a considerable doubt about the point.

As I really had not expressed any opinion on this point and only stated the doubt and difficulty which had seemed to hang over it, I am not prepared to recommend that your Lordships should differ from the learned judges, and should declare the law to be erroneously laid down in a decision which has for the last thirty years been unquestioned and must in a great number of instances have been acted upon. My opinion is of little value, but I have now, after a more full examination of the question, arrived at the conclusion that, had the question been new and entire, I should have held the decision in *Doe d. Hunt* v. *Moore* (6) to be erroneous, and that John Moore took a contingent, and not a vested, interest. That, I believe, was the opinion very general in the profession at the time.

There was one circumstance to distinguish this case from all those on which it was rested, viz., *Bromfield* v. *Crowder* (5), *Edwards* v. *Hammond* (4), and *Mansfield* v. *Dugard* (3). Those were cases of a remainder and not of an immediate devise, and in *Goodtitle d. Hayward* v. *Whitby* (1) there was a trust to provide for the maintenance and education of infants, the devisees, during the minority. Then *Boraston's Case* (2) (ante p. 377, which has been considered as the leading authority in these questions was that of the estate being given to another during the minority, and the devisee was, therefore, held to take on attaining the age of twenty-one as if he merely took a remainder expectant on the determination of the estate first given as a particular estate. The like was the devise in *Goodtitle d. Hayward* v. *Whitby* (1). But it must be admitted, on the other hand, that in the present case the provision for the estate's sinking into the residue in the event of George Holland Ackers dying under age would seem to show that it belonged not to the residue before this event, and this gives colour to the doctrine that the words relating to time only point out the time when an indefeasible estate is to vest. It must also be admitted that if the circumstances of *Doe d. Hunt* v. *Moore* (6) or of the present case were in no respect distinguishable from those of *Bromfield* v. *Crowder* (5) and of *Edwards* v. *Hammond* (4), these cases are clear law and cannot now be doubted, and would decide *Doe d. Hunt* v. *Moore* (6). The former was, after much discussion, affirmed in this House, and in the course of the full consideration which it underwent in the Common Pleas, the court had the record in *Edwards* v. *Hammond* (4) examined and found that the ejectment had been brought while the lessor of the plaintiff was under age (only fifteen), and that he prevailed, and, consequently, that the remainder was held to vest before the alleged contingency and that the attaining twenty-one was not a condition precedent.

Bromfield v. *Crowder* (5) was a devise to A. for life, remainder to B. for life, remainder to C. if he should live to attain twenty-one, but in case he died before, and D. survived him, then to D. if he attained twenty-one, and not otherwise, and, if both boys died under twenty-one, over to E. in fee. It was held that C. took a vested interest in fee determinable on his dying under twenty-one. It was a case on all fours, as the court said, with *Edwards* v. *Hammond* (4).

We may now assume that whatever differences exist in these cases, and whatever might have been our opinion of them before the extreme application of them made in *Doe d. Hunt* v. *Moore* (6), the principle there sanctioned having been for so many years adopted by acquiescence, no course ought now to be taken which can break in upon it. It is of the most essential consequence that the doctrines which have been long received for law and acted upon by the courts in

A their decisions, and by parties and their professional advisers in the disposition of property, should not be shaken. The courts, and even this House, have frequently proceeded upon this principle, and have sanctioned what even plainly appeared to be erroneous principles, introduced and long assumed as law, rather than occasion the great inconvenience which must arise from correcting the common error, and recurring to more accurate views. Accordingly, when *Cadell* v. B *Palmer* (11) was argued in this House, I advised that your Lordships should abide by the received extension which had for a great length of time been given to the period within which an executory devise might be held good as not falling within the rule against perpetuities. In disposing of that case, however, my argument went expressly upon this view—while I showed, I think, clearly, that the doctrine of twenty-one years and some months had originated in a manifest error originally C arising from the period at which a recovery could be suffered to bar remainders. That argument I, however, perceive has not been reported.

We may then assume that, if this devise had been to George Holland Ackers directly, the legal estate, the estate given, would have been vested and not contingent. The only question that remains is whether the interposition of trustees, the trust being declared to assign, convey, and assure the premises (not to receive D the rents and profits, that was *Stanley* v. *Stanley* (7), but only to convey) to George Holland Ackers when and so soon as he shall attain twenty-one years makes any difference and converts the vested into a contingent interest.

It was contended that because the immediate interest is vested in the trustees and they are only directed to convey and to assign to George Holland Ackers when he is of age the act done to entitle George Holland Ackers is postponed till that time, and his E interest, therefore, only vests at that time. But there can be no doubt that the act which entitles him is the devise. From this he derives his interest, though an equitable interest, and the only difference between his case and that of a devisee without trustees interposed or directed to convey is that the legal estate remains in the trustees during his minority and that the equitable estate vesting in him during that minority would be divested upon his decease under age. The inclination F certainly should always be to make the rules of courts of equity conform as much as possible to the principles recognised at law, and I can see no reason whatever for dealing upon different principles with the vesting of an equitable and of a legal interest, in respect to the present question.

A doctrine at one time appears to have prevailed, which would sanction by analogy the difference here contended for, although the question arose on a power G and not a trust. The second point in *Leonard Lovies's Case* (12) turned upon this, and the Chief Justice (who, if it was in the Common Pleas, must have been SIR EDWARD COKE; if it was in the King's Bench, I have endeavoured to ascertain who it was, and it must have been FLEMING, C.J., it was in 1613) held that, a power of appointment being in the first taker with remainder over, in default of such appointment the effect of the subsequent limitations was suspended and the H estates limited were contingent instead of vesting subject to be divested by a subsequent execution of the power. LORD HARDWICKE held a similar opinion in *Walpole* v. *Lord Conway* (13), but, apparently, without due consideration, for in a fully considered case, *Cunningham* v. *Moody* (14), he determined otherwise, and LORD KENYON, in *Doe d. Willis* v. *Martin* (15), expresses his satisfaction that what he holds to be an erroneous doctrine in *Leonard Lovies's Case* (12), and in I *Walpole* v. *Conway* (13), had been set right by LORD HARDWICKE, on reconsidering the question more fully, and at a time of life when his judgment was more mature.

Later cases, however, come fully up to the present, and seem to leave no doubt upon the question. It seems enough to mention two: *Goodtitle d. Hayward* v. *Whitby* (1) and *Stanley* v. *Stanley* (7). The former of these was the case of a devise to trustees in trust for the testator's nephews, that is, on trust to lay out the rents and profits for maintenance and education of the nephews during their minority, and a devise to the nephews themselves in fee when and as they should respectively attain the age of twenty-one. The provision for maintenance and education may be held to differ

that case from the present as regards the question of vested or contingent, but as regards the equitable estate given, and the effect of that gift upon the question of vesting the cases are substantially alike, for though there is no devise in trust to convey when the nephews attained twenty-one, yet there is a trust during their minority, and this was not held to prevent the estate from vesting immediately. The court held that the gift vested the estate in the nephews instanter, with a trust to be executed for their benefit during their minority.

The present is a question of the estate vesting immediately during a period when the trustees still held the legal estate, during the minority of George Holland Ackers, at the determination of which they are to convey to him. *Leonard Lovies's Case* (12) was relied on against the vesting. But Lord Mansfield [in *Goodtitle d. Hayward* v. *Whitby* (1), 1 Burr. at p. 234] cited a case which he recollected in Chancery (*Tomkins* v. *Tomkins* (16)), of a devise to A. in trust for B. until he should attain twenty-one, and, if he should die before, over, in which the age of B. was held only a limitation of the trust during his minority and B. was decreed to take the whole by implication. This case was followed in *Doe d. Wheedon* v. *Lea* (17), and ruled that case. But *Stanley* v. *Stanley* (7) seems on all fours with the case at Bar as regards the point now under consideration; at least I cannot in any way distinguish the two. There was an executory trust, the devise being to trustees to receive the rents and profits until A. came of age, and immediately after to convey to the use of A. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A., and for default of such issue or if A. died under age, then in trust over. After the case had been argued Sir William Grant, M.R., suggested that, as the trustees to preserve contingent remainders only took on the determination of A.'s life estate and as the trustees were not to convey to him until he attained twenty-one, he could, while under age, have no life estate on the determination of which the trust to preserve the contingent remainders attached. Chiefly on this suggestion of His Honour, a second argument was ordered. The estate was then considered in two lights, either as executed or executory. The Master of the Rolls held it clear that A. took a vested remainder for life expectant on the determination of the estate which the trustees took during his minority, holding that the trustees received the rents and profits for the heirs-at-law during the devisee's minority, and His Honour said that on consideration there appeared to be nothing in the difficulty which had struck him at the former argument, because the right could not depend on the conveyance to be made, which must conform to the rights declared by the will.

On the whole I can see no reason to doubt that the estate in the present case vested immediately in George Holland Ackers, determinable upon his dying under the age specified, the trustees taking an interest for his behoof limited to his minority.

I must add a few words in consequence of something that has been said in the course of the argument upon the attendance of the learned judges as if they had been called in on an equitable question. They were not so called in. They were called in on the legal question, and not unnecessarily called in. If, indeed, it had been clear that, but for the equitable point, the remainder vested, their assistance would have been unnecessary, but it was impossible to know how that question should be decided in the conflict of authorities, and had it been determined in favour of contingency, the equitable question never could have arisen. Their being called in was, therefore, essentially useful to aid the decision of the case.

Upon these grounds I entirely concur in the proposition which my noble and learned friend has submitted to your Lordships, that the decree of His Honour the Vice-Chancellor should be affirmed.

LORD CAMPBELL—This case has been so elaborately discussed by my noble and learned friends who have preceded me that it is quite enough for me to say that I entirely concur in the view they have taken of it. The question is with

respect to the right to the rents and profits of the Wheelock estate between the death of the testator and the time when George Holland Ackers reached the age of twenty-one years. That depends upon whether he took a vested estate upon the death of the testator liable to be divested upon his dying before twenty-one without issue. I must say that I entirely concur in the opinion of the learned judges with respect to the legal question, and when I look at the limitation over upon his dying before attaining twenty-one without issue I think that it cannot admit of any reasonable doubt that, if it had been a legal limitation, it would have vested in George Holland Ackers immediately upon the death of the testator, liable to be divested on his dying before twenty-one without issue.

Then the question arises as to what effect is to be given to this being only an equitable estate because it is a conveyance to trustees for the use of the trustees, their heirs and assigns, to convey in the manner stated. I think that equity in this case ought to follow the law, and *Stanley* v. *Stanley* (7) seems to me to be a direct authority for that purpose. It was cited by the counsel for the appellant with a different view, to show that the estate did not vest before twenty-one, not with a view to show that, if it had been a legal limitation the estate would have vested before twenty-one, the circumstance of its being an equitable estate made any difference. There it was held that the rents and profits between the death of the testator and Thomas Massey reaching twenty-one did not go to him, but went to the heir-at-law. Therefore, it was considered that the estate did not vest in him till he reached twenty-one. That would only be applicable to the first point in the case, but there is a distinction which my noble and learned friends have referred to, that there the trustees were expressly required to receive the rents and profits until Thomas Massey reached the age of twenty-one, therefore, rebutting any presumption that Thomas Massey was to have any interest, legal or equitable, till he reached the age of twenty-one years. Therefore, there is that distinction with respect to the first point.

With respect to the second point, it appears to me to be an express authority to show that in this case George Holland Ackers took an equitable estate on the death of the testator, liable to be divested on his dying before twenty-one without issue, and that, consequently, the rents and profits which accrued till he reached twenty-one, he having survived, belonged to him, and that, therefore, the decree ought to be affirmed.

LORD BROUGHAM—I quite agree with my noble and learned friend that that case, upon the first point, is by no means irreconcilable with the present because there was a devise of the rents and profits until Thomas Massey reached twenty-one. It is a stronger authority upon the second point, inasmuch as the Master of the Rolls at first leaned the other way, and changed his opinion upon further consideration.

Appeal dismissed.

HINTON *v.* HINTON

[Lord Chancellor's Court (Lord Hardwicke, L.C.), July 14, 1755]

[Reported 2 Ves. Sen. 631, 638; Amb. 277; 28 E.R. 402, 406]

Specific Performance—Contract—Need for certainty—Refusal of decree—Contract entered into under duress.

A court of equity will not grant a decree for the specific performance of an agreement where the contract is not certain. Nor where there is any suggestion that the defendant entered into it under duress, but the fact that the contract was made by the defendant while he was in prison is not a ground for avoiding it if it was made after he had had proper assistance and advice.

Notes. Copyhold tenure was abolished by the Law of Property Act, 1922, as from Jan. 1, 1926, as was also freebench with a saving where the husband or wife died before that date.

As to defences to claims for specific performance, see 36 Halsbury's Laws (3rd Edn.) 280 et seq. For cases see 44 Digest (Repl.) 29 et seq.

Cases referred to:

(1) *Musgrave* v. *Dashwood* (1688), 2 Vern. 45; 1 Eq. Cas. Abr. 120, pl. 11; 23 E.R. 639; subsequent proceedings, 2 Vern. 63.

(2) *Taylor* v. *Wheeler* (1708), 2 Vern. 564; 2 Salk. 449; 23 E.R. 968, L.C.

Bill for a decree for the specific performance of a conveyance.

The father of the plaintiff was copyholder for life of an estate in which by the custom of the manor his widow was entitled to freebench. When in gaol he entered into an agreement for valuable consideration for the sale of that estate to his son, but died without executing the agreement before actual surrender of the copyhold and the passing of the legal estate to the son who brought this bill for specific performance of the agreement and that to the exclusion of the widow's customary freebench.

LORD HARDWICKE, L.C.—There are two questions. First, where a copyholder for life with a customary widow's estate, entering into an agreement for valuable consideration for sale of that estate, dies without executing that agreement and without making that surrender and passing the legal estate, and the widow survives, whether the purchaser of that estate by such agreement in equity is entitled in a court of equity to have a specific performance not only against the representative of the husband, but also against the wife so as to exclude that freebench or customary estate which she would be otherwise entitled to. Next, supposing there may be such a case, and the court would carry it into execution, whether in the present case there is sufficient proof of what this agreement was to warrant a court of equity to carry it into execution.

As to the first there might originally be some difficulty, but notwithstanding *Musgrave* v. *Dashwood* (1), I think, taking it as a general proposition, this court might do it. Copyhold estates are liable to agreements and trusts to be declared on them as freeholds are, and, therefore, notwithstanding that general reason as to the lord's fine (in 2 Vern. 63) it has been often determined that, if a copyholder enters into an agreement for sale and dies before surrender, or makes a surrender, and dies before presentment (which makes that surrender void), this court will decree that, being for valuable consideration, to be carried into specific performance against the heir or voluntary claimant standing in place of that copyholder. That was particularly *Taylor* v. *Wheeler* (2) which underwent a good deal of consideration, and is often cited, but cited on another head, to show that assignees under a commission of bankruptcy take the bankrupt's estate bound by all the equity to which the estate was liable in the hands of the bankrupt, which has been so settled ever since. As it would be so against assignees under a commission of bankruptcy and against the heir-at-law of the copyholder, or any person entitled

to the benefit of the life-estate as special occupant during the life of the bankrupt, the question then is as to the widow by reason of freebench, and whether she is in the like case of such assignees, or heir, or person claiming voluntarily under the copyholder.

It is argued for the plaintiff that she is because freebench differs from dower at common law as it is a right the widow has on the death of her husband of such copyhold lands whereof her husband dies seised; that is the custom, whereas dower is a right in the widow of such lands as the husband is seised of during the coverture, and, therefore, by marriage the wife gains an inchoate right to dower which the husband cannot defeat without her levying a fine, and, therefore, not without consent, which is not the case of freebench, for that the husband by parting with the estate during coverture prevents that right, and, therefore, the widow derives from her husband, as she was in his power. That is a mixed question. She does so far take from the husband that her widow's estate is in the power of the husband to deprive her of, if he surrenders fairly during the coverture, but it is a right arising from the custom of the manor, and that is a reason that breaks in a little upon the other part, for the custom of the manor is the ground of the right. Yet there are several cases in which this court will take the benefit of it from her notwithstanding she had the benefit of it by law, and, therefore, it is admitted that, if the husband is seised only as trustee, as if another person purchased a copyhold estate for lives or in fee in name of the husband and paid the purchase-money, if the wife claimed freebench, this would prevent her claiming it against the cestui que trust, because he was owner in equity of the estate, and in this it does not differ from dower at common law, for, if the husband is seised merely as trustee, the wife would be entitled to dower at law, but this court would not suffer her to take advantage of it because it would be taking part of that estate the whole of which was in another, and against conscience. This is not a trust declared, but a trust of construction of this court, that is, where a contract for purchase of an estate whether freehold or copyhold, and the vendor dies before the conveyance of the legal estate by surrender (as it is in this case), if the contract is performed on the part of the purchaser, or if he has done all that is necessary on his part, the court considers things contracted to be done for valuable consideration, as done, and considers the other as trustee from the time he ought to have performed.

That goes a great way to this point. The principal case against this is that of the issue in tail and remainder, and it is truly said that, if a man, seised of an estate tail with or without remainder over, contracts for sale and receives the purchase money, and dies in the first case without levying a fine or without a recovery in the latter case, this court would not carry into execution against the issue in tail, as was the case of Mr. Savil of Medley who, when tenant in tail, chose rather to live in gaol and be served in plate there than to perform his agreement, but the ground of that is the issue in tail in the one case or remainderman in the other claim per formam doni from the creator or author of the estate tail, and, therefore, though in the power of tenant in tail to be barred by a particular conveyance, that not being done, the court cannot take away that right they derive not from the tenant in tail but from the author. That is a different ground.

If, therefore, it had not been for *Musgrave* v. *Dashwood* (1), I should have but very little doubt to determine this case. The ground there, that the widow's estate was not to be considered as an encumbrance, must be that it was not created by the husband. I do not understand that part of the case where the book says that the court of law was divided. I do not see how that could come in question in a court of law, nor do I see how the lord was concerned as to the fine in that case where the bill was dismissed, for that does not at all seem to be a reason to support it. If the articles were such as amounted there to a severance of the joint tenancy in equity in such case this court would decree against the survivor.

But I should not think that authority sufficient to determine this, if this case

rested upon that, for where it is a clear case for valuable consideration, the court may do it. But the nature of this agreement makes the doubt. The court would expect it should most clearly appear what were the terms of that agreement—that it should be certain, plain, and fair in all respects. Considering the agreement before me, I cannot say that that appears. I do not know what it was, and in order to carry into execution the terms thereof must appear. The agreement was entered into between father and son while the father was in gaol. That is an objection, unless it is cleared up. I have no doubt but a man might make such an agreement in gaol, but it must be after having proper assistance and advice and in a fair manner. Courts of law will, of course, set aside on motion warrants of attorney, unless of an attorney attending on his part, of his own procuring, employed by himself, and not procured by the person taking the warrant of attorney, which is a very prudent and cautious rule, and a good rule for this court to go by. How that was, does not appear in the present case. No consideration is mentioned in the letter of attorney; it is only for divers good causes and considerations him thereunto moving. That may, as it is said, let into proof, but in this case of a specific performance the court expects the whole to be in writing in some way or other. It is said, the real consideration was that the son was to undertake to pay debts of the father, but there was no proof of that to my satisfaction, nor what debts he was to pay, nor reduced to any kind of certainty. In a case so circumstanced, of an agreement from a father while in gaol, and in a case doubtful of itself, and where there is authority, it is too hard, and the agreement does not appear with sufficient certainty to decree it.

GARTH *v.* COTTON

[Lord Chancellor's Court (Lord Hardwicke, L.C.), July, August 10, Michaelmas Term, 1750, February 5, 1753]

[Reported 1 Ves. Sen. 524, 546; 3 Atk. 751; 1 Dick. 183; 27 E.R. 1182, 1196]

Settled Land—Waste—Collusion between tenant for life and remainderman—Timber cut and sold—Proceeds of sale held for benefit of estate.

If there is fraudulent collusion between a tenant for life and a remainderman to commit waste by cutting timber, which they sell, the court will intervene in the interest of all persons interested in the estate and direct the proceeds of the sale to be held for the benefit of the estate.

Notes. Applied: *Paget* v. *Gee* (1753), Amb. 807; *Stanfield* v. *Habergham* (1804), 10 Ves. 273. Considered: *Williams* v. *Williams* (1808), 15 Ves. 419. Applied: *Bagot* v. *Bagot*, *Legge* v. *Legge* (1863), 32 Beav. 509. Explained: *Birch-Wolfe* v. *Birch* (1870), L.R. 9 Eq. 683. Followed: *Re Cavendish*, *Cavendish* v. *Munday*, [1877] W.N. 198. Referred to *Lansdowne* v. *Lansdowne* (1815), 1 Madd. 116; *Panrott* v. *Palmer* (1834), 3 My. & K. 632; *Johnstone* v. *Hall* (1856), 2 K. & J. 414; *Sawyer* v. *Goodwin* (1867), 36 L.J.Ch. 578; *Phillips* v. *Homfray* (1883), 24 Ch.D. 439; *A.-G.* v. *Glossop*, [1907] 1 K.B. 163.

As to waste, see 34 Halsbury's Laws (3rd Edn.) 649–658. For cases see 40 Digest (Repl.) 695 et seq.

Cases referred to:

(1) *Chudleigh's Case*, *Dillon* v. *Freine* (1594), 1 Co. Rep. 113 b, 120 a; Poph. 70; 1 And. 309; 76 E.R. 261, Ex. Ch.; 38 Digest (Repl.) 849, *643*.

(2) *Archer's Case*, *Baldwin* v. *Smith* (1597), 1 Co. Rep. 66 b; 2 And. 37; Cro. Eliz. 453; 76 E.R. 146; 24 Digest (Repl.) 926, *9337*.

(3) *Hales* v. *Risley* (1673), Poll. 369; 86 E.R. 578; 49 Digest (Repl.) 899, *8428*.

(4) *Cholmley's Case*, *Cholmley* v. *Hammer* (1597) 2 Co. Rep. 50 a; Moore, K.B. 342; 76 E.R. 527; 38 Digest (Repl.) 835, *472*.

(5) *Duncomb* v. *Duncomb* (1695), 3 Lev. 437.

(6) *Smith d. Dormer* v. *Parkhouse* (1740), 7 Mod. Rep. 366; affirmed sub nom. *Parkhurst* v. *Smith d. Dormer* (1742), Willes, 327; 6 Bro. Parl. Cas. 351; 125 E.R. 1197; sub nom. *Smith d. Dormer* v. *Parkhurst*, 3 Atk. 135, H.L.; 38 Digest (Repl.) 836, *488*.

(7) *Mansell* v. *Mansell* (1732), ante p. 343; Cas. temp. Talb. 252; 2 P.Wms. 678; 2 Barn.K.B. 187; 2 Eq. Cas. Abr. 748; 24 E.R. 913, L.C.; 47 Digest (Repl.) 469, *4202*.

(8) *Dayrell* v. *Champness* (1700), 1 Eq. Cas. Abr. 400; 21 E.R. 1131; 2 Digest (Repl.) 139, *1078*.

(9) *Musgrave* v. *Parry* (1715), 2 Vern. 710; 23 E.R. 1067, L.C.; 49 Digest (Repl.) 742, *6940*.

(10) *Pye* v. *Gorge* (1710), 1 P.Wms. 128; 2 Salk. 680; Prec. Ch. 308; affirmed sub nom. *Gorges* v. *Pye* (1712), 7 Bro. Parl. Cas. 221; 3 E.R. 144, H.L.; 47 Digest (Repl.) 468, *4200*.

(11) *Tipping* v. *Piggot* (1711), Gilb. Ch. 34; 1 Eq. Cas. Abr. 385; 25 E.R. 25, L.C.; 47 Digest (Repl.) 468, *4199*.

(12) *Whitfield* v. *Bewit* (1724), 2 P.Wms. 240; 24 E.R. 714; 2 Digest (Repl.) 109, *771*.

(13) *Udal* v. *Udal* (1648), Aleyn. 81; 82 E.R. 926; sub nom. *Uvedale* v. *Uvedale*, 15 Vin. Abr. 141, tit. Maeresme, pl. 3; 2 Digest (Repl.) 105, *725*.

(14) *Paget's Case* (1593), 5 Co. Rep. 766; 77 E.R. 170; 40 Digest (Repl.) 695, *1901*.

(15) *Anon.* (1599), Moore, K.B. 554, pl. 748; 72 E.R. 754; 40 Digest (Repl.) 696, *1903*.

(16) *Tracy* v. *Tracy* (1681), 1 Vern. 23; 23 E.R. 278, L.C.; 40 Digest (Repl.) 698, *1937*.

(17) *Anon.* (1704), Freem. Ch. 278; 22 E.R. 1209; 2 Digest (Repl.) 115, *843*.

(18) *Abrahal* v. *Bubb* (1679), 2 Show. 69; Freem. Ch. 53; 2 Swan. 172; 89 E.R. 798, L.C.; 40 Digest (Repl.) 696, *1911*.

(19) *Lady Evelyn's Case* (undated), cited in Freem. Ch. at p. 55; 22 E.R. 1054; 2 Swan. 170, n.; 2 Digest (Repl.) 107, *755*.

(20) *Fleming* v. *Fleming* (1744), cited in 1 Ves. Sen. at p. 526; sub nom. *Fleming* v. *Bishop of Carlisle*, 3 Atk. at p. 756; 1 Dick. 209; 2 Digest (Repl.) 107, *756*.

(21) *Robinson* v. *Litton* (1744), 3 Atk. 209; 6 Cru. Dig. 428, 429; 26 E.R. 922; 2 Digest (Repl.) 96, *609*.

(22) *Jesus College* v. *Bloom* (1745), 3 Atk. 262; 1 Amb. 54; 26 E.R. 953; 2 Digest (Repl.) 104, *715*.

(23) *Lord Derwentwater's Case* (1720), cited 1 Dick. 214.

(24) *Abbot* v. *Burton* (1708), 11 Mod. Rep. 181; 1 Com. 160; 2 Salk. 590; 88 E.R. 976; 24 Digest (Repl.) 929, *9373*.

(25) *Martin* v. *Strachan* (1744), 6 Bro. Parl. Cas. 319; 1 Wils. 66; Willes, 444; 2 Stra. 1179; 5 Term Rep. 107, n.; 2 E.R. 1106, H.L.; 24 Digest (Repl.) 929, *9374*.

(26) *Price* v. *Morgan* (1676), 2 Cas. in Ch. 215.

(27) *Eaton College* v. *Beauchamp and Riggs* (1669), 1 Cas. in Ch. 121.

(28) *Anon.* (1678), 2 Mod. Rep. 293; 86 E.R. 1080, Ex. Ch.; 23 Digest (Repl.) 75, *704*.

(29) *Fermor's Case* (1602), 3 Co. Rep. 77 a; 76 E.R. 800; sub nom. *Farmor* v. *Smith*, Toth. 101; 35 Digest (Repl.) 88, *812*.

Bill for an order directing the defendant, Sir John Hind Cotton, to repay £1,000 received by him for the sale of timber cut from an estate of which the estate was tenant.

One Garth was tenant for ninety-nine years if he so long lived, without impeachment of waste excepting voluntary waste, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail, remainder to the defendant in fee. Garth having been long married without having children, entered into an agreement with the defendant to cut down timber on the estate, and divide the profits between them. He afterwards had a son by a second wife who, after his father's death, when he was of age and had suffered a recovery, brought this bill to oblige the defendant to refund £1,000 received by him as his share of the money arising by sale of timber, with interest.

Feb. 5, 1753. **LORD HARDWICKE, L.C.**—The foundation of the plaintiff's equity depends on the trust to preserve the contingent uses. There was a plain fraud in the agreement to injure the contingent remainders. There is a privity between the tenant for years and remainderman, the tenant for years being a fiduciary.

Four questions are to be considered. First, the intent of limitations to trustees to support contingent remainders. Secondly, what estate they take at law, and what actions they may bring. Thirdly, the nature and extent of the trust in equity. Fourthly, how charged in equity for breach of trust. As to the first question, they took rise from *Chudleigh's Case* (1) and *Archer's Case* (2), but not in practice till after the usurpation. The dispute in *Chudleigh's Case* (1) was the power of feoffees to uses created since the Statute of Uses to destroy contingent uses before the cestui que use was in being. It was not determined that the conveyance by the cestui que use for life would bar the contingent remainders, but it was afterwards determined in *Archer's Case* (2), very properly set forth by Pollexfen in *Hales* v. *Risley* (3).

As to the second, it was a question whether they took any estate or only right of entry, but it was settled in *Cholmley's Case* (4), so in 41 Edw. 3, Fitzherbert tit. Waste 53, and *Duncomb* v. *Duncomb* (5), which last was the first case where a limitation to trustees came in question. If, then, it was so settled upon a limitation for life, it is stronger after a limitation for years, as was well urged by Lee, C.J., in *Smith d. Dormer* v. *Parkhouse* (6) (7 Mod. Rep. 366). They have, therefore, in law an interest in the timber by the enjoyment of it in the tenant for years, but they could not bring waste at common law and the Statute of Gloucester [6 Edw. 1, c. 5; repealed by Civil Procedure Acts Repeal Act, 1879] gives it only to those who have an interest in the inheritance.

Thirdly, these trusts are to be construed in the most liberal manner agreeable to natural justice, as in *Mansell* v. *Mansell* (7). The destruction of timber or mines may more affect the inheritance than any other. It is said that they cannot bring a bill to stay waste; they only can enter, but that is preserving the shell and not the kernel. The words comprehend all remedies in law and equity, for equity, being now part of the law of the kingdom, is comprehended. They may bring a bill to stay waste before the contingent uses come in esse: *Dayrell* v. *Champness* (8), their trust affects their conscience. The same bill may be for an infant en ventre sa mère, which is stronger; *Musgrave* v. *Parry* (9). Therefore, the trustees might have brought this bill in this case. If so, the parties would be discharged only on the terms of making satisfaction in damages to be laid up until the contingent uses should come in esse.

As to the fourth, in *Pye* v. *Gorge* (10) it was held that trustees joining in destroying contingent remainders committed a breach of trust and the estates created were void: *Tipping* v. *Piggot* (11); and *Mansell* v. *Mansell* (7), which decided that the trustees shall be obliged to make a recompense and the alienee restore the estate. The difference here is that there is no positive act, but only laches in not bringing a bill for injunction. But they who have profited by the

destruction are not excusable. Notice of the trust makes the laches of the trustees to affect them, and notice of the trust affects the alienees. Therefore, as in alienation with notice, a re-conveyance is just, so here, though before the contingent remainderman be in rerum natura and had no jus in re nor ad rem. The objection for the defendant, that the limitation to the trustees does not alter the power of tenant for life, assumes too much. The invention was to abridge the legal rights of tenant for life, and of the remainderman to take a surrender. According to *Whitfield* v. *Bewit* (12) and *Udal* v. *Udal* (13) (Aleyn, at p. 82), the right in law is that as soon as they are severed they vest in the remainderman and trover lies, but this was a collusion with the remainderman. Where a legal right is acquired by collusion, this court shall enjoin or give a recompense.

I will adhere, as far as I can, to the rule æquitas sequitur legem, though until the remainder is vested, no action of waste lay, yet a remedy is given: *Paget's Case* (14), and, if the estate be divested and afterwards re-vested, he may bring waste: 1 INST. 356 a. The successor of a bishop may maintain waste for waste after death of his predecessor, when the freehold is in the King: FITZHERBERT'S NATURA BREVIUM 112; 1 INST. 356 a. It may be said that this is by the Statute of Marlbridge, but I hold it not: and so says 2 INST. 151, 152; 29 Edw. 3, 15 b.; 2 Hen. 4, 2; and 2 ROLL. ABR. 824. A court of equity has gone further in restraining waste than the law: *Anon.* (15); 1 ROLL ABR. 377; *Tracy* v. *Tracy* (16); *Anon.* (17); *Abrahal* v. *Bubb* (18), and a stronger case, *Lady Evelyn's Case* (19), there cited (Freem. Ch. at p. 55). On the same foundation I determined *Fleming* v. *Fleming* (20), and *Robinson* v. *Litton* (21) went further. It is objected that no recompense will be decreed upon a bill now brought for an account, and *Jesus College* v. *Bloom* (22) was cited, but that is widely different from the present case; and *Whitfield* v. *Bewit* (12) is cited. The distinction arises from the collusion between the remainderman, and tenant for years.

As to the length of time, no laches in the plaintiff, and the law gives waste after a mesne remainderman is dead; besides the plaintiff submits to what is in the answer. An objection occurs to me that there is a recovery, which has altered the remainder. I admit 1 INST. says that regard is to be had to the continuance of the reversion in the same state, but there is no new use created, and it was determined to be the same estate in *Lord Derwentwater's Case* (23), and *Abbot* v. *Burton* (24), and in another case, *Martin* v. *Strachan* (25), affirmed by the Lords. In this case the plaintiff is entitled to the same relief although the remedy at law should be extinguished. There are many instances where a court of equity has relieved in cases where the action dies with the person. Before the statute of William and Mary [4 Will. & Mar., c. 24 (1692), s. 12; replaced by s. 29 of Administration of Estates Act, 1925] there was no remedy at law against executor of an executor for a devastavit, yet a court of equity did this before: *Price* v. *Morgan* (26); *Eaton College* v. *Beauchamp and Riggs* (27); *Anon.* (28). In all cases of fraud the remedy never dies with the person, but will follow the estate of the party liable to the demand. Here the will appearing on the face of the articles proves they had notice and, therefore, it was a fraud with the remainderman. Arguments ab inconvenienti have been urged, but those on the part of the defendant are not so great as those on the other side. By *Fermor's Case* (29) (3 Co. Rep. at p. 79 a), trustees to preserve contingent remainders are a proper medium between perpetuities, and too great licence of power over estates.

Decree for plaintiff.

VISCOUNT FALKLAND *v.* BERTIE AND OTHERS

[LORD CHANCELLOR'S COURT (Sir John Somers, L.C., assisted by Sir George Treby, C.J. (C.P.) and Sir John Holt, C.J. (K.B.)), Hilary Term, 1698]

[Reported 2 Vern. 333; Holt, K.B. 230; 1 Eq. Cas. Abr. 110; Freem. Ch. 220; 3 Cas. in Ch. 129; 12 Mod. Rep. 182; 1 Salk. 231; 23 E.R. 814]

Will—Condition—Condition precedent—Non-performance—Relief—Performance prevented by persons interested—Condition subsequent—Non-performance—Relief—Impossibility.

A court of equity will grant a beneficiary under a will relief against the consequences of non-performance of a condition precedent where performance of the condition has been prevented by the contrivance of persons interested, e.g., remaindermen. Relief will be granted in the case of non-performance of a condition subsequent, so that the estate be not defeated or forfeited, if by the act of God performance of the condition becomes impossible.

Will—Evidence—Declarations of testator—Evidence of testator's regard for beneficiary and proposed husband.

Where the language of a will is clear and the intention of the testator is made plain parol evidence is not admissible of declarations by the testator as to the kindness he had for a beneficiary, statements that he would not disinherit her, and of his regard for her proposed husband. The court must take the will as it finds it.

Infant—Will—Devise on condition—Non-performance—Infancy as excuse.

Where an estate is given to an infant on a condition stipulating for the performance of an act which the infant is capable of performing infancy is no excuse for non-performance of the condition.

Notes. Referred to: *Bromley* v. *Fettiplace* (1700), 2 Freem. Ch. 245; *Shaftesbury* v. *Shaftesbury* (1725), Gilb. Ch. 172; *Harvey* v. *Aston* (1737), 1 Atk. 361; *Acherley* v. *Vernon* (1739), Willes, 153.

As to conditions attached to testamentary gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 914 et seq., and as to evidence of testator's intention, see ibid., 955 et seq. For cases see 48 DIGEST (Repl.) 290 et seq., 481 et seq.

Cases referred to:

(1) *Popham* v. *Bamfield* (*or Bampfeild*) (1682), 1 Vern. 79, 167; 1 Eq. Cas. Abr. 108; 23 E.R. 391, L.C.; 48 Digest (Repl.) 332, *2842*.

(2) *Fry* v. *Porter* (1670), 1 Mod. Rep. 300; 1 Cas. in Ch. 137; 2 Rep. Ch. 26; 1 Eq. Cas. Abr. 111; 86 E.R. 898; 48 Digest (Repl.) 293, *2590*.

(3) *Earl of Mountague* v. *Earl of Bath* (1693), 3 Cas. in Ch. 55; 2 Rep. Ch. 417; 22 E.R. 963; sub nom. *Duchess of Albemarle* v. *Earl of Bath*, Freem. Ch. 121, 193; 37 Digest (Repl.) 393, *1248*.

(4) *Earl of Salisbury* v. *Bennet* (1691), 2 Vern. 223; affirmed, Nels. 170; 21 E.R. 818; sub nom. *Bennett* v. *Lord Salisbury*, Freem. Ch. 118, H.L.; 48 Digest (Repl.) 353, *3026*.

(5) *Ventris* v. *Glydd* (1694), cited in West temp. Hard. 374; 25 E.R. 987.

Bills for the enforcement of a trust under a will, an account, and other relief.

John Cary, having neither wife nor child, and the defendant Elizabeth Bertie being his niece and heir-at-law, on Sept. 10, 1685, made his will and thereby devised his manor of Stanwell and divers other manors and lands, being his real estate, except his manor of Caldicot, which he thereby gave to his kinsman Edward Cary, to the defendants, John Grout, Sir William Whitlock, and one Hall, and their heirs, upon trust to pay what debts and legacies his personal estate should not extend to satisfy, and then to hold in trust for Elizabeth, then Elizabeth Willoughby, if she should within three years after his death be married to Francis

Lord Guildford, for her life, and after her death, if such marriage was had, to the eldest son of Lord Guildford on her body to be begotten and to the heirs male of the body of such son; in default of such issue to all other the sons of Elizabeth by Lord Guildford in tail male; in default of such issue or if such marriage should not take effect within three years, then in trust for Anthony Lord Falkland for life and to his first and other sons in tail male; in default of such issue in trust for Edward Cary, the plaintiff's father, for life, and to his first and other sons in tail male; and in default of such issue, in trust for the right heirs of John Cary, the testator. The testator devised to his trustees his leasehold property subject to the same trusts as were declared concerning the freehold, and he devised to them his household goods at Stanwell that the same might go and be for the benefit of the person who by virtue of his will should be entitled to the house.

On Sept. 20, 1685, he made a codicil, reciting that by his will he had appointed the trust of his real estate to be for the benefit of Elizabeth Willoughby if she should within three years after his decease be lawfully married to Lord Guildford. Now his will was that, if the said marriage should take effect before years of consent, and, if not, afterwards when of a competent age, ratified, Elizabeth Willoughby should have no benefit of the trust other than she would have had if the marriage had never been solemnised. He devised the tuition of his niece to Lady Wiseman, Lord Guildford's sister, and soon after he died.

The marriage between Lord Guildford and Elizabeth Willoughby did not take effect within the three years, and after they were elapsed, she married the defendant Bertie, having first by her trustees come to an agreement with Lord Falkland and Edward Cary (the plaintiff's father) that they, on the terms agreed on, would permit her to enjoy the estate, but they, being both but tenants for life and since dead, the plaintiff, the son and heir of Edward Cary, brought his bill claiming the benefit of the trust, demanding an account of profits, and a conveyance of the legal estate from the trustees. Mr. Bertie and his wife had also brought their bill to the like effect.

SIR GEORGE TREBY, C.J.—I take this will to be designed by the testator for a final and fixed settlement of the estate. Although Elizabeth Willoughby was his niece and heir-at-law, yet Lord Falkland was of his name and blood, though not altogether so nearly related to him as was Elizabeth. It appears likewise in the case that the testator was related also to Lord Guildford by marriage, but not in blood.

HIS LORDSHIP said that, first, he was of opinion that Elizabeth's being willing and consenting, or endeavouring to bring about the marriage, would not be of any avail or moment in the case, for the will was formed not upon the endeavour or agreement of the parties to marry, but upon the event. If a marriage should be had according to the will, then Elizabeth was to have an estate for life and so to first and other sons of Lord Guildford on her body begotten, but was to take nothing by the will unless the marriage was actually had. This appeared more plainly by the codicil, whereby it was provided that, although a marriage should be so far proceeded in as to be solemnised between his niece and Lord Guildford infra annos nubiles, yet unless afterwards confirmed when both of age capable to contract marriage (for by law until both were of competent age, that was, the man fourteen, and the woman twelve, either of them were at liberty to go off from such marriage), such marriage was not to be reckoned a marriage within the intention of the will, nor would Elizabeth take any estate thereby. The defendant's counsel seemed to be a little at a loss what relief, what conveyance, to ask from the trustees, whether a fee or an estate in tail male to Elizabeth and her first and other sons by Mr. Bertie, or whether to content themselves only with an estate for life.

In determining and judging the case he was of opinion (i) that no regard was to be had to the greatness or quality of the persons. The rule the Divine Lawgiver laid down was, that there should not be any respect, even to the poor, in judgment, much less to the rich; (ii) that all the parol proof on both sides was to be

rejected, and thrown out of the case, i.e., the declarations of the kindness the testator had for his niece and that she was his heir, he would not disinherit her, and the like. The great uncertainty there was of proof showed how necessary it was to make the Statute of Frauds. The case, therefore, must be determined as it stood upon the will, and, consequently, to enter into an inquiry what regard he had to his niece, how far he considered Lord Guildford either in point of affection, in gratitude for good offices received, or by reason of affinity by marriage, or the like, was not material nor necessary to know. It might be it was not possible to know what induced the testator to limit his estate in the manner as by his will was expressed, but, he having done it, they must agree with DYER that men's deeds and wills by which they settled their estates, were the laws that private men were allowed to make, and they were not to be altered even by the King in his courts of law, or conscience. They must take the will as they found it.

HIS LORDSHIP continued: That being so, thus far his intention plainly appears, that his heir should not have his estate unless she married Lord Guildford, and likewise that neither Lord Guildford nor his issue were to have any benefit by it unless he married his niece. The condition, which is a condition precedent, not having been performed, the marriage not having taken effect, it is plain that the estate by the letter of the will is gone over to Lord Falkland, and the trust of the estate vested in him.

All that remains is whether a court of equity can relieve in this case, and in what manner.

First, the defendant Elizabeth cannot have the inheritance, for, if she had performed the condition in the will, she was to have had but an estate for life with a remainder to her first and other sons by Lord Guildford, and she must not have a greater and better estate by not performing than she could have had in case she had performed the condition.

Secondly, if she cannot be entitled to the inheritance, yet it has been insisted on by her counsel that she ought to have an estate for her life and to her first and other sons in tail male by Mr. Bertie, for it was not through her default that the marriage with Lord Guildford was not accomplished, and she has equitably performed the will by marrying a person equal in quality and estate to Lord Guildford. This they call a performance of the condition cy-près. She has gone as far as was in her own power. *Popham* v. *Bampfeild* (1), where the court relieved upon an equivalent as a precedent to suit this case, was cited.

But that case is not like this, and they run upon a plain mistake in saying that they come to be relieved against a forfeiture and that the testator by his will principally intended the advancement of his niece, whereas the will is made in derogation of her right as heir-at-law. Although the testator might be willing, and it would be agreeable enough to him if such marriage took effect, yet he handles that matter with some indifferency, for he does neither enjoin his niece to marry Lord Guildford, nor so much as recommends to either party, but leaves them at their liberty. But if the marriage took effect, the estate was to go accordingly; if not, the estate was to go to those of his name and blood. If they should marry, they were to take the estate; it is given to them in the conjunctive, to neither of them severally. There is no latitude left for her to choose another man. It is not a case in compensation; it is not capable of an equivalent to answer the will of the testator, nor can, as I apprehend, a court of equity relieve or decree even an estate for life to the defendant unless they can decree Mr. Bertie and Lord Guildford to be the same person.

SIR JOHN HOLT, C.J., was of the same opinion that the bill ought to be dismissed: I am clearly of opinion that all the parol proof as to what the testator either declared or intended is to be disallowed. The case must stand confined to the will, and is to be considered as it stands upon the will alone, and must have been so even before the making of the Statute of Frauds, for by the Statute of Wills, by which men are enabled to make wills and devise their lands, it must be

A a will in writing, and if parol proof be admitted, it would introduce a mighty uncertainty and an infinite inconvenience. The last will of a man is looked upon as the last serious act of his life as to the disposition of his estate, and must be admitted sufficient to repeal all former wills, and much more to control all parol declarations.

It is plainly a condition precedent. In cases of conditions subsequent, that are B to defeat an estate, those are not favoured in law. If the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited, and a court of equity may relieve to prevent the divesting of an estate, but cannot relieve to give an estate that never vested. *Fry* v. *Porter* (2), is a much stronger case and more proper for relief, the condition there being to be performed by an infant, and an infant, too, that had no notice of the condition in the will. In *Earl of* C *Mountague* v. *Earl of Bath* (3), the Duke of Albemarle, who made the settlement and had reserved a power to revoke, yet having tied himself to strict terms as to the manner and circumstances of doing it, although by his last will made in a very solemn and deliberate manner he sufficiently expressed his intention and resolution to revoke it, yet the court would not relieve in that case, and, if the party himself, who was master of the estate and might have disposed of it as he D pleased, is to be tied down to the terms and circumstances he had imposed upon himself: those that claim or derive under him, those to whom he gives an estate upon terms and conditions, must stand much more obliged to the performance of the conditions and circumstances upon which it is given. If the condition becomes impossible even by the act of God, as if Lord Guildford had died within the three years, or soon after the death of the testator, the estate would never E arise. There would be no relief even in that case, much less is there any room for relief in the case in question.

On the will, the testator's intention is plain and express, that his niece should not have the estate unless the marriage took effect. An actual marriage was plainly by him intended upon the face of the will, and by his further declaration in the codicil put beyond doubt. The prospect that the marriage might take effect seems F to be the only consideration that induced him to give the estate in such a manner as he has done. It appears by the proof in the cause that he had a real kindness and affection for Lord Guildford, and, as he had a kindness and affection for his niece, so it likewise appears he was desirous to preserve the estate in his name and family. Whereas it is objected that the heir-at-law is to be favoured, that may hold, where the words are ambiguous or doubtful there shall be no strained G construction to work a disherison. But where there is no doubt, no ambiguity, the plea of heirship must not control a plain and express will.

It is very vain what has been pretended, that he did not intend to disinherit his heir, when the whole frame and intent of the will is to prevent the descent, and that she should not take as heir. It is likewise as vain to talk of an equivalent. Although the lady may be as well preferred or advanced in marriage to Mr. Bertie, H that is no equivalent to the testator, who had an affection for Lord Guildford and was for ought appears an utter stranger to Mr. Bertie, and was minded his niece should marry Lord Guildford. It is in truth no more an equivalent than it may be pretended to be a performance of the condition. It would be hard to maintain, where an estate is given upon condition that the niece marries one man, that she has performed that condition, not in marrying him, but in marrying another man. I If it was a rule in equity that estates ought to go according to the will of the dead, I must advise the LORD CHANCELLOR to dismiss the bill.

SIR JOHN SOMERS, L.C.—It is plainly a condition precedent. By the will the three years' profits after the decease of the testator were to be applied to pay the debts, so nothing descended in the meantime nor vested. There is no ground to maintain, what was offered from the Bar, that this should be deemed a condition subsequent or to divest an estate, and there could not be stricter words to make a condition precedent than what were inserted in the will.

The testator's intention is manifest that his niece should take nothing as heir unless there should happen to be a failure of issue male of the Carys, but if his niece married Lord Guildford, then he preferred her and she was to take before Lord Falkland and the rest of his name and blood, but, if such marriage was not had, then Lord Falkland and those of his name and blood are preferred to her. If Lord Guildford had married her and died without issue male, it is plain that neither her daughters by him nor any issue male of hers by any after taken husband could have become entitled to the estate by the devise in the will.

As to what has been said of its being a hard limitation, and that, it being in the case of a trust, there is a great latitude of expounding in a court of equity to correct the rigour of a devise, limitations of estates, whether by way of trust or by estates executed at the common law, are to be governed by the same rule. It is much better that an estate should be carried from the heir by a hard or imprudent disposition than that the courts in Westminster Hall should take upon them to vary from the intention of the testator expressed in his will. As to the plea of infancy, it is true infants are always favoured. In this court are several things that belonged to the King at pater patriæ, and fall under the care and direction of this court, where the interests of infants are so far regarded and taken care of that no decree shall be made against an infant without a day being given him to show cause after he comes of age. An infant may by his next friend call his guardian to an account even during his minority. If a stranger enters and receives the profits of an infant's estate, he shall in the consideration of this court be looked upon as a trustee for the infant, and the like. But the court never pretended to change the nature of infants' estates, or to make that absolute which was defeasible. Where an estate is given to an infant upon a condition, such act as an infant can perform must be done by him; and infancy in such case is no excuse; and so it was held in *Fry* v. *Porter* (2), which has been cited.

Popham v. *Bampfeild* (1) has no resemblance to this case, for here can be no equivalent. The nature of this condition is not in point of value, but on a collateral act to be done, and as to *Earl of Salisbury* v. *Bennet* (4), there was a performance of the condition in substance and no express devise over of the £10,000 if the countess, then Mrs. Bennet, did not observe the circumstances prescribed by the will as to her marriage. So likewise *Ventris* v. *Glydd* (5) on Sir Nicholas Sloughton's will. The consent of the aunt was asked and she did not absolutely refuse, but pretended she was coming to town, and, it being a suitable match and all the other relations consenting, the consent of the aunt was what she ought, according to the trust reposed in her, to have given, application being made to her on that behalf. Beside the aunt's consent, there were trustees as to the portions until the daughters attained twenty-one, and the condition of consent was taken to have relation to the term only, to their marrying in their infancy, and there the daughter had attained twenty-one before her marriage.

Therefore, upon the whole matter, I am of opinion (i) that Mrs. Bertie had no pretence to claim the absolute fee and inheritance of the lands in question. It would be very absurd to say that she should profit by disobeying, and that she should take a greater and better estate by not performing than she could have had by the performance of the condition; (ii) nor can her claim of having a like estate, or a conveyance cy-près, viz., to her and her issue by William Bertie as it would have been to her and her issue by Lord Guildford if the marriage had taken effect, be maintained or supported either by precedent or reason, unless Mr. Bertie could really become the Lord Guildford; (iii) as the condition was the performance of a collateral act and did not lie in compensation, I do not see anything that could be a just ground for relief in a court of equity or to give Mrs. Bertie even an estate for life, unless the remaindermen (who were to take the estate on non-performance of the condition) had used any indirect practice or contrivance to prevent the marriage from taking effect.

Bill dismissed.

A

CLUN'S CASE

[Court of King's Bench (Sir Edward Coke, C.J., Houghton, Doderidge and Croke, JJ.), Michaelmas Term, 1613]

B [Reported 10 Co. Rep. 127 a; Cro. Jac. 309; 77 E.R. 1117]

Landlord and Tenant—Rent—Time when due and payable—Death of lessor before due date—Right to apportioned rent.

Rent becomes due at the last moment of the day on which it is made payable, or, where there is a provision in the lease for days of grace, at the last moment of the last day of grace. At common law the executor of a lessor C who died before the due date of rent was not entitled to recover an apportioned part of the rent due up to the death.

Notes. Under the Distress for Rent Act, 1737 (6 Halsbury's Statutes (2nd Edn.) 147), and the Apportionment Acts, 1834 and 1870 (ibid., vol. 13, 852, 867) rent was made apportionable.

Considered: *Re Aspinall*, [1961] 2 All E.R. 751. Referred to: *Fox* v. *Whitchcocke* (1616), 2 Bulst. 290; *Hemming* v. *Brabason* (1660), O.Bridg. 1; *Rockingham* v. *Oxenden* (1711), 2 Salk. 578; *R.* v. *Treasury Lords, Re Queen Dowager's Annuity* (1851), 20 L.J.Q.B. 305.

As to time of payment of, and apportionment of, rent see 23 Halsbury's Laws (3rd Edn.) 543–547, 555–559. For cases see 31 Digest (Repl.) 251–257, 285–287.

E Cases referred to:

(1) *Hill* v. *Grange* (1556), 2 Dyer, 130 b; 1 Plowd. 164; 73 E.R. 284; 31 Digest (Repl.) 253, *3879*.

(2) *Smith and Bustard's Case* (1589), I Leon. 141; 73 E.R. 131; 31 Digest (Repl.) 254, *3888*.

(3) *Anon.* (1558), Dal. 27; 2 Dyer, 142 a; 123 E.R. 246; 31 Digest (Repl.) 254, *3896*.

F (4) *Pilkington* v. *Dalton* (1598), Cro. Eliz. 575; 78 E.R. 819; 31 Digest (Repl.) 254, *3889*.

(5) *Walgrave* v. *Moor* (1598), cited 10 Co. Rep. 129 b.

Demurrer to a declaration by the plaintiff, William Clun, claiming from the defendant, Henry Archer, the sum of £9 which he alleged was due to him as G executor of Anne Breather.

The declaration stated that by an indenture dated Nov. 26, 1606, Anne Breather demised to the defendant one messuage, two mills, one garden, and divers lands at Coopersale in Essex from the feast of St. Michael the Archangel then last past for fifty years, if the said Anne should so long live. The rent of £9 a quarter was payable on four customary feast days or within thirteen weeks thereafter, one H feast day being that of the feast of the Annunciation, i.e., Lady Day, March 25. On April 2, 1612, within thirteen weeks from March 25, Anne Breather died. The rent due at March 25 being then unpaid, the plaintiff brought this action, upon which declaration the defendant demurred in law.

This case was often argued at Bar, and in Michaelmas Term, 1613, it was argued by Sir Edward Coke, C.J., and Houghton, Doderidge and Croke, JJ.; and it I was resolved that the action of debt was not maintainable. Three reasons for this resolution were shown [states Sir Edward Coke in his report]. First, because the disjunctive is added for the benefit of the lessee, and it is more for his benefit to have the last day, in which case there are two days of payment: One voluntary and that at the election and liberty of the lessee to pay it at the days of the said feasts; the other day of payment is at the end of the thirteen weeks after, and that is the extreme and legal time. Therefore, forasmuch as the said Anne Breather died before the extreme and legal time, the lessee is discharged of the rent by the act of God for the same quarter: vide *Hill* v. *Grange* (1)

(Plowd. at pp. 172, 173), the most extreme time is the legal time. It is to be known that in the case of payment of rent issuing out of land there are four times of payment, the first time of payment voluntary and not satisfactory, and yet good to some special purpose; the second voluntary, and in case satisfactory and in case not; the third legal and satisfactory absolute and not coercive, the fourth legal satisfactory and coercive.

As to the first, if the lessee, donee, or tenant pay his rent before the day, it is voluntary, and not satisfactory, for the cause rendered in the third reason, but if it be paid in the name of seisin of the rent, although it shall not enure by way of satisfaction, yet it shall give a sufficient seisin to this purpose to have his assize, or other remedy, for the law takes delight in giving remedy. Therewith agrees LITT. cap. Attornment, 127 b; vide YEAR BOOKS (25) 45 Edw. 3, 44 b; 49 Edw. 3, 15; 15 Edw. 3, Execution 63; 37 Hen. 6, 33; 39 Hen. 6, 36; 5 Edw. 4, 2. As to the second, if the rent is payable at the feast of Easter and the tenant pays the rent in the morning, and the lessor dies at two hours before noon of the same day, this payment is voluntary, and yet it is a good satisfaction against the heir, but not against the King: Y.B. 44 Edw. 3, 3 B. As to the third, legal time is a convenient time before the last instant of the day, which is the most extreme time, and is satisfactory and not coercive, for till the end of the day no remedy is given by the law: Y.B. 21 Hen. 6, 40 A. As to the fourth, that is, when the rent is due and in arrear, and, therefore, it is well said by the poet

"Judicis officium est ut res, ita tempora rerum
Quærere, quæsito tempore tutus eris."

The second reason was when the lessee does not make payment at the first day according to his election, then the rent is absolutely due at the second day, and the second day is as well parcel of the reservation as the first day, and, therefore, after the non-payment at the first, it is now upon the matter as much in law as if it had been reserved at the second day only, for when the whole election is past, as in 3 DYER, 344, pl. 2. If a man by deed grants a rentcharge to one and his heirs and does not say for him and his heirs and dies, now the time of election to make it an annuity is past, and, therefore, if the grantee brings a writ of annuity against the heir, it shall not discharge the land because when no election remains it is as much in law as if there never had been any election. Therefore, upon the books in 43 Edw. 3, Bar. 194; 44 Edw. 3, 32; 15 Edw. 3, Execut. 63; 5 Edw. 2, 2. This case was put: If one on Oct. 1 makes a lease for years or for life, or a gift in tail, yielding by the year a pair of gilt spurs at the feast of Easter, or twenty shillings at the feast of St. Michael the Archangel, in this case, if the lessee does not pay the spurs at the feast of Easter, nothing is due till the feast of St. Michael.

The third reason was because the rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee, for these words reddendo inde, or reservando inde, are as much as to say that the lessee shall pay so much of the issues and profits at such days to the lessor, for reddere inde nihil aliud est quam acceptum restituere, seu reddere est quasi retro dare, and redditus dicitur a reddendo, quia retro it, sc. to the lessor, donor, etc., sicut provent' a proveniendo; and obventus ab obveniendo. That is the reason that the rent so reserved is not due or payable before the day of payment incurred, because it is to be rendered and restored out of the issues and profits, and that is the reason that, if the land is evicted, or if the lease determines before the legal time of payment, no rent shall be paid, for there shall never be an apportionment in respect of part of the time as there shall be upon an eviction of part of the land. [See now note supra.] Therefore, if a tenant for life makes a lease for years, rendering rent at the feast of Easter, and the lessee occupies for three quarters of the year, and in the last quarter before the feast of Easter, the tenant for life dies, here shall be no apportionment of the rent for three quarters of the year, because no rent was due till the feast of Easter, and no apportionment shall be

A in respect of time, but in the same case, if part of the land had been evicted before the feast of Easter and the feast of Easter incurred in the life of the lessor, there shall be an apportionment of the rent, but not in respect of the time which well continued, but in respect that parcel of the land leased is evicted.

This difference appears in our books: Y.B. 27 Edw. 3, 84 B. In debt against executors, declaring that their testator granted him a pension of £20 to remain B with him in the King's wars at the time that he should be reasonably warned, to take at four times of the year equally, and showing, further, that he went with him to Calais by the warning of their testator and was there armed, and demanded judgment and prayed his debt. To which the defendant said that for the first quarter he was paid £5 and showed forth an acquittance, and before the second quarter ended the testator died. The defendant demanded judgment of the action, C and Mowbray, counsel for the plaintiff, moved, since you do not deny the pension to be granted as one entire by the year, upon a condition which we have performed, viz., that we have remained with him, we pray the debt. But WILBY, C.J., by the rule of the court, awarded that the plaintiff should take nothing by his writ, because there should be no apportionment in respect of part of the time although it happened by the act of God: vide YEAR BOOKS 10 Edw. 4, 18; 20 Hen. 6, 6; D 9 Edw. 4, 1; 30 Hen. 8 BR. APPORTIONM. 7. If I am bound to you by bond of £20 to be paid at four usual feasts of the year by equal portions, the obligee shall not have an action of debt before all the terms incurred. The same law of a contract, but, if a rent is reserved on a lease for years at four usual feasts of the year, the lessor shall have an action of debt after the first day and shall not stay till the whole is due, because it is accounted in law as a reservation of parcel of the E issues and profits of the land, which is no debt before the day as in the said case of a bond or contract. That is the true difference between the case of the bond, and a rent reserved on a lease for years in LITT. 117, b; vide FITZHERBERT'S NATURA BREVIUM 267. And note a difference between a recognisance of a debt payable at several days, for that is not like a bond, but a rent reserved on a lease for years: vide 2 DYER, 113 a, pl. 55, another difference between a covenant or promise, F and a contract or bond: vide 5 Mar. Action sur le Case, BR. 108; 10 Edw. 2, Execut. 137, and 16 Edw. 2, ibid. 138. Vide 9 Edw. 3, 7.

For authorities on the point, I have seen a report of a case in the time of BALDWIN, C.J., of the Common Pleas (1542), that it was the opinion of all the justices, that if a man seised of land in fee on Oct. 1 makes a lease of the land for ten years from the feast of St. Michael then last past, yielding to him and his G heirs the yearly rent of £20 at the feast of St. Michael the Archangel, or within one month after, that in this case, if the lessor dies between the feast of St. Michael and the end of the month, the heir shall have the rent as incident to the reversion, and not the executors as rent behind, because it was not due till the end of the month. The same law if the lessor between the said two days had granted the reversion over, and the tenant attorned, the grantee should have the H rent as incident to the reversion.

In Michaelmas Term, 1555, Serjeant Prideaux moved MONTAGU, C.J., and the other justices of the Common Pleas, that, if a man makes a lease for years yielding a yearly rent at the feast of Easter or one month after, with condition of re-entry, and the lessee tenders the rent at the last instant of the feast of Easter, if the lessor may enter upon demand made at the last instant of the month. I It seemed not, because the lessee had liberty to pay it then, and the difference was taken between the said disjunctive reservation, and when the reservation is at a certain feast and a condition is added that, if it be behind by the space of a month after the feast, then the lessor shall re-enter, there the lessee, for the salvation of his lease, cannot tender it at the last instant of the feast-day, because he has not such liberty and election as in the other case.

It was said by the new serjeant that in the time of BALDWIN, C.J., it was resolved by all the justices that in the said case of the disjunctive reservation, if the lessor dies between the two days, the heir shall have the rent, and not the

executors, which case the Chief Justice showed in court reported by an ancient and learned Bencher of the Inner Temple, Trin. 31 Eliz. in the King's Bench, Rot. 666, *Smith and Bustard's Case* (2), where the case was in effect that the plaintiff Smith leased certain land for years, yielding yearly a rent of £35 at the feasts of St. Michael and the Annunciation of our Lady, or within twelve days after each of the said feasts, payable at the font-stone in the Temple church, upon condition that, if the said rent of £35 or any part of it be behind and not paid per præd' spatium 12 dier' prox' post aliquod præd' festorum seu dierum solutionis inde prout supradict' est, then the said lease should be void. It was adjudged that the lessee in safeguard of his lease should have twelve days after the first twelve days to pay the said rent, for when the rent is not paid at the first day, it is as much as if it had been reserved upon the twelfth day after, and where it is said, per præd' spatium 12 dierum post, etc., by good construction all the words ought to take effect, "post aliquod præd' festor' seu dierum solutionis inde"; and dies solutionis is the twelfth day after the feast, and, therefore, the lessee shall have twelve days after the twelfth day, which is dies solutionis post festum, etc., and that for the lessee's greater advantage, for whose benefit further time was given. These words, prædict' spatium 12 dierum, stand right in good sense, sc. per prædict' spatium 12 dierum post prædict' 12 dies, for that is prædict' spatium, although they have not the same beginning as the other have. And so the quære in *Anon.* (3) was well resolved and adjudged in the Common Pleas in *Pilkington* v. *Dalton* (4). In that case a parson of a rectory made a lease for years rendering rent at the feast of St. Michael or within one month after. The lessor died ten days after the feast of St. Michael, and the plaintiff was barred by judgment of the court, because the lessor died before the rent was due.

In *Walgrave* v. *Moor* (5) in Easter Term, 1598, in the King's Bench, Lady Elizabeth Pawlet, late the wife of Chedwick Lord Pawlet, being seised of the manor of Wade in the county of Southampton for her life, by deed indented leased the manor to William Pawlet for ninety-nine years if she (Elizabeth) should so long live, yielding the yearly rent of £100 at the feasts of St. Michael the Archangel, and the Annunciation of our Lady, or within forty days after each of the said feasts. William Pawlet made Dulcibel his wife executrix, and died. Dulcibel married John Moor. Lady Elizabeth Pawlet made Edward Walgrave her executor, and died on the thirteenth day after the feast of St. Michael. Her executor brought an action of debt for the half year ended at the feast of St. Michael before the death of the Lady Elizabeth, and tota curia contra querentem, but by entreaty of some of the justices, John Moor gave the plaintiff £10.

In the case at Bar judgment was given, quod querens nihil capiat per billam.

Judgment for defendant.

A

PELLY *v.* ROYAL EXCHANGE ASSURANCE CO.

[Court of King's Bench (Lord Mansfield, C.J., Denison and Foster, JJ.), May 23, 1757]

[Reported 1 Burr. 341; 97 E.R. 343]

B *Insurance—Marine insurance—Policy—Construction—Benefit of trade—Favour of assured—Observance of usage.*

Policies of insurance are to be construed largely, for the benefit of trade and in favour of the insured, and having regard to the course of trade in any particular place. In general, what is usually done by such a ship as that insured, with such a cargo, and in such a voyage, is understood to constitute C a part of every policy as much as if it were expressed.

Insurance—Marine insurance—Termination of risk—Variation by assured of voyage or risks insured—Knowledge implied in insurer—Nature of voyage—Customary course and manner of performance.

If, after a marine insurance is effected, the risks of the insured voyage are D varied, or the voyage itself altered, by the owner or master of the ship, the insurer ceases to be liable, because he is understood to engage that the adventure should be completed without any unknown fortuitous dangers. But the insurer, in estimating the premium at which he is willing to indemnify the shipowner against all risks, must be taken to have had under consideration the nature of the voyage to be performed and the usual course and manner of performing it. E

Insurance—Marine insurance—Risks insured against—Cargo—Transhipment.

Per Lord Mansfield, C.J.: If goods are insured on board one ship to a port and thence on board another ship, the first that can be got, the insurance extends through all the intermediate steps of removing from one ship to the other as usual [i.e., in the customary way] for the means must be taken to be F insured as well as the end.

Notes. Considered: *Rodocanachi* v. *Elliott* (1873), L.R. 8 C.P. 649 (see [1874–80] All E.R.Rep. 618); *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498. Referred to: *Brough* v. *Whitmore*, [1775–1802] All E.R.Rep. 546; *Johnston* v. *Benson* (1819), 4 Moore, C.P. 90; *Palmer* v. *Blackburn* (1822), 1 Bing. 61; *Gabay* v. *Lloyd* (1825), 5 Dow. & Ry.K.B. 641 (see [1824–34] All E.R.Rep. G 422); *Harrison* v. *Ellis* (1857), 7 E. & B. 465; *Australian Agricultural Co.* v. *Saunders* (1875), 44 L.J.C.P. 391; *Lazard Bros. & Co.* v. *Brooks* (1932), 37 Com. Cas. 224.

As to duration and area of risk under an insurance policy, see 22 Halsbury's Laws (3rd Edn.) 56–73. For cases see 29 Digest (Repl.) 151 et seq.

H Cases referred to:

(1) *Bond* v. *Gonsales* (1704), 2 Salk. 445; Holt, K.B. 469; 91 E.R. 386; 29 Digest (Repl.) 176, *1123*.

(2) *Tierney* v. *Etherington* (1743), cited in 1 Burr. at p. 348; 97 E.R. 347; 29 Digest (Repl.) 92, *396*.

(3) *Poole* v. *Fitzgerald* (1752), Amb. 145, Ex. Ch.; *Pole* v. *Fitzgerald* (1754), Amb. 214; Willes, 650, n.; 27 E.R. 142; sub nom. *Fitzgerald* v. *Pole*, 4 I Bro. Parl. Cas. 439, H.L.; 29 Digest (Repl.) 319, *2413*.

Case Reserved on a trial at Guildhall, London, before Lord Mansfield, C.J., of an action on a policy of insurance. A verdict was found for the plaintiff, subject to the opinion of the court.

The plaintiff being part-owner of the ship *Onslow*, an East India ship, then lying in the Thames, and bound on a voyage to China and back again to London, insured it at and from London to any ports and places beyond the Cape of Good Hope, and back to London, free from average under ten per cent. upon the body, tackle,

apparel, ordnance, munition, artillery, boat, and other furniture of and in the ship, beginning the adventure upon the ship, etc., from and immediately following the date of the policy, and so to continue and endure until the ship, with all her ordnance, tackle, apparel, etc., shall be arrived as above, and has there moored at anchor twenty-four hours in good safety. It was provided that it should be lawful for the ship, to sail to and touch and stay at any ports or places whatsoever without prejudice to the insurance. The perils mentioned in the policy were the common perils, viz., of the seas, men of war, fire, enemies, pirates, etc., and all other perils, losses and misfortunes. The premium was seven guineas per cent. with abatement of two per cent. in case of a loss. The ship arrived in the River Canton in China where she was to stay, to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture were, by the captain's order, taken out of her, and put into a warehouse or storehouse called a bank-saul, built for that purpose on a sandbank, or small island, lying in the river, near one of the banks, called Bank-Saul Island, about two hundred or two hundred and twenty yards in length, and forty or fifty yards in breadth, in order to be there repaired, kept dry, and preserved until the ship should be heeled and cleaned, and refitted. Sometime after this, a fire accidentally broke out in the bank-saul belonging to a Swedish ship, and communicated itself to another bank-saul and thence to the bank-saul belonging to the *Onslow*, with the result that it consumed the same with all the sails, yards, tackle, cables, rigging, apparel, and other furniture belonging to the *Onslow*, which were therein.

It was stated that it was the universal and well-known usage, and had been so for a great number of years, for all European ships which went a China voyage when they arrived near Bank-Saul Island, in the River Canton, to unrig the ship, and to take out her sails, yards, tackle, cables, rigging, apparel, and other furniture and to put them on shore in a bank-saul built for that purpose on the island in the manner that had been done on the present occasion by the captain of the *Onslow*, in order to be there repaired, kept dry, and preserved until the ship should be heeled, cleaned, and refitted. The Case stated that it appeared that the so doing was prudent and for the common and general benefit of the owners of the ship, the insurers, and insured, and all persons concerned in the safety of the ship. The ship arrived in the Thames from her voyage in September, 1755, having been unrigged and put in the best condition the nature of the place and circumstances of affairs would permit. The question raised by the Case was whether the insurers were liable to answer for the loss happening on the bank-saul, within the intent and meaning of this policy.

Williams for the plaintiff: The insurers have professedly and explicitly insured the ship and all her rigging, furniture, etc., from fire, etc., from her going out to her return. They must be taken to be apprised of the usage and to have calculated their premium accordingly. What has here been done is stated to have been done for the benefit of the insurers, and of the ship, and of all persons concerned in the safety of it, and also to have been prudent. If the body of the ship had been burnt in this interim, and these sails and furniture had been saved by being in this warehouse, the insurers would then have had the benefit of this salvage. Therefore, they ought, in the contrary event, to be answerable for them when they were by these means burnt and the ship not burnt. It was the captain's duty, to perform the voyage in the usual and proper course. This was so far from being a neglect or misbehaviour in the captain, that he is stated to have acted prudently, and for the benefit of the insurers, and of all concerned. Secondly, this is within the words of the policy. It is an insurance from London to any ports or place beyond the Cape of Good Hope and back and during the voyage, and fire is expressly insured against. It is also within the meaning and intent of the policy. For this loss has happened within the usual course of the voyage and of this species of trade. Therefore, the insurers are liable. Where an insurance is for one entire voyage, the contract cannot be suspended, and revived

again: if it be suspended at all, it is determined. Yet they will hardly argue that this contract was absolutely determined by this act that is stated. Thirdly, foreign writers hold that where the assurance is general, the insurer is liable to all loss happening in the usual course of the voyage. He cited, LOCCENIUS, DE JURE MARITIMO, L. 2, c. 5, s. 10, De Aversione Periculi; MARCARLUS, DE JURE MERCATOR, L. 2, c. 15, No. 148; ROCCUS, DE ASSECURATIONIBUS, No. 138.

Sir Richard Lloyd, for the insurers, agreed to these general principles, and that the insurers were liable for all losses during the course of the voyage, but denied counsel's conclusions, and insisted that this policy was confined to losses at sea, whereas this loss was a loss on shore. This (he said) is a policy upon the body of a ship, and, therefore, is manifestly confined to losses at sea only. Besides, these goods are averred, by the very declaration itself, to have been carried on shore. Its being an insurance out and home does not interfere with this position. As to the supposition that the ship had been burnt and the sails etc., saved, it is no argument at all, for, if they had not been lost, the insurers could not certainly have been liable to pay for them. As to the prudence of the captain, it might be prudent with regard to the owners, but this care of them is not to affect the insurers. He is, indeed, to act his best, for both, but diverso intuitu and not to serve the one, at the risk of the other. As to the words of the policy, the case does not be within them; referring himself to the words themselves. The cases cited do not affect the present case, and foreign writers have said no more than English ones. For, no doubt, the insurance must be understood to be in the usual course of trade, and durante itinere. But the question is: What is the iter insured?

This is a common policy of insurance in the old and ordinary form, and it must be understood, as these policies were understood, before the East India Co. had a being. The intent of it must be collected from the instrument itself. It is an insurance of the ship with its tackle and furniture, etc., from port to port. Policies must be construed upon the words of them, or from necessary consequences. If anything beyond the natural import of the words was intended, it ought to have been specified; if not specified, it cannot be supposed. The court alone are to judge of the extent of the contract. These contracts have been construed strictly. A deviation from the particular voyage insured shall discharge the insurer unless a necessity intervenes which ought to alter the case. But even that must be within the compass of the voyage described, for if it happens after a deviation, the insurer is discharged, even though the ship should have returned into the right road again before the accident happened. This present accident did not happen within the voyage insured, for it happened on land.

Counsel says that this happened in the course of trade. My answer is that we have nothing to do with the course of trade. We have nothing to do with anything but the course of navigation, which is quite a different thing. The sails, tackle, etc., were insured in the ship, and if the captain takes them out of the ship and puts them anywhere else, the insurers are not answerable, and its being for the benefit of the ship makes no difference. It did not arise from necessity, much less from a necessity arising in the voyage. This act of mere prudence or convenience cannot affect the insurers. Their knowing this to be the course of the voyage will not prove that they meant to insure anything on land. They cannot, by their charter, do it, for that restrains them from insuring on land, and, therefore, they certainly never intended it.

Cur. adv. vult.

May 23, 1757. **LORD MANSFIELD, C.J.**, delivered the following opinion of the court: By the express words of the policy, the defendants have insured the tackle, apparel and other furniture of the ship *Onslow*, from fire, during the whole time of her voyage, until her return in safety to London without any restriction. Her tackle, apparel, and furniture were inevitably burnt in China, during the voyage, before her return to London. The event then which has happened is a

loss within the general words of the policy, and it is incumbent upon the defendants, to show, from the manner in which this misfortune happened, or from other circumstances, that it ought to be construed a peril which they did not undertake to bear. From the nature, object, and utility of this kind of contract, consequences have been drawn, and a system of construction established, upon the ancient and inaccurate form of words in which the instrument is conceived. The mercantile law in this respect is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same. Hence, among many others, the following rules have been settled.

If the chance is varied or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable because he is understood to engage that the thing shall be done safe from fortuitous dangers, provided due means are used by the trader to attain that end. But the master is not in fault if what he did was done in the usual course or necessarily ex justa causa. The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation, at the time he engaged. He took the risk upon a supposition that what was usual or necessary, would be done. It is absurd to suppose when the end is insured that the usual means of attaining it are meant to be excluded. Therefore, when goods are insured, "till landed," without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore. If it is usual to stay so long at a port or to go out of the way the insurer is considered as understanding that usage: *Bond* v. *Gonsales* (1) was so ruled by Sir John Holt, C.J. If goods are insured on board one ship to a port and thence on board another ship, the first that can be got, the insurance extends through all the intermediate steps of removing from one ship to the other as usual. For the means must be taken to be insured as well as the end.

All this has been determined in *Tierney* v. *Etherington* (2). That was an insurance on goods in a Dutch ship, from Malaga to Gibraltar, and at and from there to England and Holland, both or either, on goods as hereunder agreed, beginning the adventure from the loading, and to continue till the ship and goods be arrived at England or Holland and there safely landed. The agreement was that upon the arrival of the ship at Gibraltar, the goods might be unloaded and re-shipped in one or more British ship or ships for England and Holland and to return one per cent. if discharged in England. It appeared in evidence that when the ship came to Gibraltar, the goods were unloaded and put into a storeship (which it was proved was always considered as a warehouse), and that there was then no British ship there. Two days after the goods were put into the store ship, they were lost in a storm. For the defendant it was insisted that the insurance was only upon the Dutch and British ships and did not extend to the storeship, which was to be considered as a warehouse on land, and so not a peril at sea. For the plaintiff it was insisted that this was a loss in the voyage, for the policy was for all losses at Gibraltar as well as to and from. If there had been a British ship there and the goods had been put into a lighter in order to go to the British ship, and lost in the way, that would have been a loss within the policy. They had liberty to unload and re-ship, and, therefore, have a liberty to use all the means in order to do that. Lee, C.J., said:

> "It is certain that in the construction of policies the strictum jus or apex juris is not to be laid hold on, but they are to be construed largely, for the benefit of trade and for the insured. It seems to be a strict construction to confine this insurance only to the unloading and re-shipping, and the accidents attending those acts. The construction should be according to the course of trade in this place. And this appears to be the usual method of unloading

A and re-shipping in that place: viz., that when there is no British ship there, then the goods are kept in store ships."

He added that where there is an insurance on goods on board such a ship, that insurance extends to the carrying the goods to shore in a boat. So, if an insurance be of goods to such a city and the goods are brought in safety to such a port, though B distant from the city, that is a compliance with the policy if that be the usual place to which the ships come. He continued:

"Therefore, as here is a liberty given of unloading and re-shipping, it must be taken to be an insuring the goods under such methods as are proper for the unloading and re-shipping. Here is no neglect on the part of the merchant (the insured), for the goods were brought into port Nov. 19 and were lost C on the 22nd. This manner of unloading and re-shipping is to be considered as the necessary means of attaining that which was intended by the policy, and seems to be the same as if it had happened in the act of re-shipping from one ship to the other. And as this is the known course of trade, it seems extraordinary if it was not intended. This is not to be considered as a suspension of the policy, during the unloading and re-shipping from one ship D to another. For, as the policy would extend to a loss happening in the unloading and re-shipping from one ship to another, so any means to attain that end come within the meaning of the policy."

Accordingly, a verdict was given for the plaintiff. In the Easter term following, a new trial was moved for but it was refused.

E In the present case the same reasoning will hold. In general, what is usually done by such a ship, with such a cargo, and in such a voyage, is understood to be referred to by every policy, and to constitute a part of it as much as it was expressed. The usage being foreseen, is more strongly allowed to be done, than what is left to the master's discretion upon unforeseen events, yet if the master, ex justa causa, goes out of the way (as to refit, or to avoid enemies, pirates, etc.) the insurance continues.

F Upon these principles, it is difficult to frame a question which can arise out of this case as stated. The only objection is that the goods were burnt in a bank-saul and not in the ship, upon land and not at sea or upon water, and being appurtenant to the ship, losses and dangers ashore could not be included. The answer is obvious: (i) the words make no such distinction, (ii) the intent makes no such distinction. Many accidents might happen at land even to the ship. Suppose a G hurricane to drive it a mile on shore, or an earthquake have a like effect. Suppose the ship to be burnt in a dry dock. Or suppose accidents to happen to the tackle upon land, taken from the ship while refitting as on account of an accident causing a hole in its bottom or other mischance. These are possible cases. But what might arise from an accidental occasion of refitting the ship is not near so strong as a certain necessary consequence of the ordinary voyage which the parties H could not but have in their direct and immediate contemplation. Here the defendants knew that the ship must be heeled, cleaned and refitted in the river of Canton. They knew that the tackle, etc., would then be put in the bank-saul. They knew it was for the safety of the ship, and prudent that they should be put there. Had it been an accidental necessity of re-fitting, the master might have I excused taking them out of the ship ex justa causa. But describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned.

Was the chance varied by the fault of the master? It is impossible to impute any fault in him. Is this like a deviation? No. It is ex justa causa, which always excuses. And yet counsel for the insurers, being pressed in this argument, was obliged to insist "that it resembled a deviation which determines the insurance and discharges the insurer." This supposes the parties to insure from London and back again, knowing that the policy would be determined in the river of

Canton, which would be absurd. Besides it ought to make a difference in the premium upon other China voyages.

One objection was formed by comparing this case to that of changing the ship or bottom on board of which goods are insured, which the insured have no right to do. Answer: There the identical ship is essential, for that is the thing insured. But that case is not like the present. Another objection was that policies ought to be construed strictly, and not to be extended to cases omitted, which latter position is true, and must be agreed. Answer: That is not the present case, for this is not a casus omissus, but clearly within the view and bona fide intent of the policy.

Fitzgerald v. *Pole* (3) is no way applicable to the present case. The question there was whether it was a partial or a total loss, within the meaning of the policy. In that case there was nothing fixed by usage or by known and established construction (as there is in this case), so that no inference can be drawn from that case, concluding to this. Here the defendants knew that the tackle and furniture would be put in this bank-saul, as the usual, certain consequence of the voyage at sea, which always made it necessary to heel, clean and refit the ship in the river of Canton. Had the insurers been asked, they must, for their own sakes, have insisted that they should be put there as the best and safest method. They would have had reason to complain if, from their not being put there, a misfortune had happened. In that case the master would have been to blame, and by his fault would have varied the usual chance. They have taken a price for standing in the plaintiff's place as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one. Therefore, we are very clearly of opinion that in every light and in every view of this case, in reason and justice, within the words, intent and meaning of the policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss.

Judgment for plaintiff.

VALLEJO AND ANOTHER *v.* WHEELER

[Court of King's Bench (Lord Mansfield, C.J., Aston, Willes and Ashhurst, JJ.), November 10, 1774]

[Reported 1 Cowp. 143; Lofft. 631; 98 E.R. 1012]

Insurance—Marine insurance—Risks insured against—Barratry—"Every species of fraud, knavery, and criminal conduct by master or crew to prejudice of shipowner."

The term "barratry" in a policy of marine insurance includes every species of fraud, knavery, and criminal conduct wilfully committed by the master or crew of the insured ship to the prejudice of the owner, unless the owner is privy thereto.

Notes. Where a charterparty amounts to a demise of the ship the charterer, for the purposes of barratry, is in the position of shipowner: see 35 Halsbury's Laws (3rd Edn.) 352–355.

Applied: *Nutt* v. *Bourdieu* (1786), 1 Term. Rep. 323. Considered: *Phyn* v. *Royal Exchange Assurance Co.* (1798), 7 Term Rep. 505; *Earle* v. *Rowecroft*, [1803–13] All E.R.Rep. 166. Explained: *Soares* v. *Thornton* (1817), 7 Taunt. 627. Considered: *Cory & Sons* v. *Burr* (1882), 9 Q.B.D. 463 ([1881–5] All E.R.Rep. 414, H.L.). Referred to: *Lockyer* v. *Offley* (1786), 1 Term. Rep. 252; *Trinity House Master* v. *Clark* (1815), 4 M. & S. 288; *Hutton* v. *Bragg* (1816), 7 Taunt. 14; *Christie* v. *Lewis* (1821), 2 Brod. & Bing. 410; *Atkinson and Hewitt* v. *Great Western Insurance Co.* (1872), 27 L.T. 103; *Forestal Land, Timber and Railways Co.* v. *Rickards, Middows, Ltd.* v. *Robertson, Howard Bros. & Co.* v. *Kahn*, [1940] 4 All E.R. 96.

As to barratry, see 22 Halsbury's Laws 82, 83, and ibid., vol. 35, p. 189. For cases see 29 Digest (Repl.) 256–260; 41 Digest (Repl.) 296, 297.

Cases referred to:

(1) *Knight* v. *Cambridge* (1724), 8 Mod. Rep. 230; 2 Ld. Raym. 1349; 1 Stra. 581; 88 E.R. 165; 29 Digest (Repl.) 258, *1943*.

(2) *Stamma* v. *Brown* (1742), 2 Stra. 1173; 93 E.R. 1108; 29 Digest (Repl.) 258, *1941*.

(3) *Johnson* v. *Proudfoot* (circa 1774), unreported.

(4) *Elton* v. *Brogden* (1747), 2 Stra. 1264; 93 E.R. 1171; 29 Digest (Repl.) 180, *1178*.

Motion for an order for the new trial of an action on a policy of insurance on goods on board the ship *Thomas and Matthew* for a voyage from London to Seville.

The policy was made in the common form, with liberty to touch at any ports or places. The loss was assigned in different ways in the declaration: (i) by storms and perils of the sea in consequence of which the ship was obliged to go to Dartmouth to be repaired, and that afterwards a further loss happened by storms; (ii) that it happened by storms and perils of the seas in the voyage generally; and (iii) by the barratry of the master.

The cause was tried before Ashhurst, J., at Guildhall, London, at the sittings after Easter Term, 1774, by a special jury. At the trial it was proved that this ship was put up as a general ship from London to Seville, and was let to freight by one Darwin who chartered her to Brown, the captain; that it was the course of vessels going on this voyage to stop at some port in the west of Cornwall to take in provisions; that this ship, having taken her cargo aboard, sailed from London to the Downs, while she lay there all the other ships bound to the westward bore away, but she stayed till the night after and then sailed to Guernsey which was out of the course of the voyage; that the captain went there for his own convenience to take in brandy and wine on his own account, after which he intended to proceed to Cornwall; that the night after the ship quitted Guernsey, she sprung

a leak, which obliged her to put into Dartmouth, and when she was refitted she set sail again and proceeded for Helford in Cornwall, where it was always intended she should stop to take in provisions, but on her way she received further damage and on her arrival was totally incapable of proceeding on the voyage, the cargo being much damaged.

It was attempted on the part of the defendant to prove that one Willes was the owner of the ship and that the voyage to Guernsey was on his account and the goods taken on board there his property, but this evidence went little further than information and belief, except that it was proved that when the ship arrived at Helford the wine was delivered to him in his cellar. The judge directed the jury that if the going to Guernsey was without the knowledge of Darwin it was barratry and they ought to find for the plaintiff, but if done with his knowledge, then it was not barratry. If they should be of opinion that it was without the knowledge of Darwin, then he desired them to say whether or not they thought it was with the knowledge of Willes. The jury found a verdict for the plaintiff, and said they thought the going to Guernsey was without the knowledge of Darwin, whom they looked upon to be the owner, but they thought it was with the knowledge of Willes.

In Trinity Term, 1774, a motion was made for a new trial, and on showing cause all the counsel on each side were heard. The court then said that there were two points in the case: (i) whether, to entitle the plaintiff to recover, the loss must not have happened during the time of the barratry, or have been occasioned immediately by the act of barratry, it being said that, if a policy be on a ship and the ship is seized for smuggling, that is barratry, but here the goods were not seized for smuggling nor did the loss happen during the act of barratry, but afterwards; (ii) whether, though the ship were let to freight, the captain was not subject to the orders of the owners, it being said that, if a ship be let out generally to freight, the freighter is owner for that voyage, but if there be only a covenant to carry goods, the owner of the vessel would have the direction of her and the hiring of the master and mariners. The court ordered that the case should stand over till Michaelmas Term.

Buller for the plaintiffs: The question is whether the plaintiffs are entitled to recover for this damage from the underwriters. To support the claim they insist that the conduct of the master in going to Guernsey, for the purpose and under the circumstances mentioned, was barratry. Supposing this to be barratry, then another question will arise, namely, whether the loss sustained by the plaintiffs was in consequence of that barratry, or, whether that loss stands so totally unconnected with the voyage to Guernsey as to be quite unaffected by it.

In all the cases that have occurred on barratry, different definitions of the word have been attempted and the same conduct has been observed in the present case. However, there will not be much difficulty in determining what is meant by the term in its general sense, whatever nicety may arise in fixing the precise limits of it, when occasion requires that should be done. Wherever a great nicety does arise, the insured should be entitled to the turn of the scale, for the end and view of insuring is to secure the merchant against all losses and misfortunes whatever, and so very liberal are underwriters in these days of their professions in policies of what they do insure against, that some writers have thought it next to impossible that where a loss does happen a doubt should remain. Molloy, Bk. 2, c. 7, s. 7, says:

> "Almost all those curious questions that former ages and the civilians according to the marine law, nay and the common lawyers too, have controverted, are now out of debate. Scarce any misfortune that can happen, or provision to be made, but the same is provided for in the policies that are now used: for they insure against heaven and earth, stress of weather, or whatsoever detriment shall happen or come to the thing insured."

Barratry in all the dictionaries is defined to be fraus, dolus, or deceptio. So are Minsheu, Dufresne [Du Cange], and Spelman.

Fraud means, not only a crime, but any wilful fault or evil design, and even a neglect, provided it be crossa negligentia, will amount to barratry; which was the case of a master sailing out of port without paying duties: *Knight* v. *Cambridge* (1). That case approaches the nearest to the present of any that can be found, and even goes beyond it. That was merely a neglect, and might have been by accident as well as design, but because it subjected the ship to forfeiture it was held to be barratry. In this case the consequence was the same, for the act of the captain subjected the ship and the goods insured to forfeiture, but the act done was infinitely worse. It did not rest merely in a non-feasance, but was a formed premeditated scheme of running away with the ship out of the course of the voyage, done for an illegal purpose, for his own private benefit, without any excuse or necessity, and neither for the benefit nor with the knowledge of the owner or freighter.

One definition of barratry given at the Bar was where the master and mariners conspire together to run away with the ship. That certainly is one species of barratry, but it can never serve as a general description of it. If it were, barratry could never be committed without the concurrence of the mariners as well as the master, the contrary of which is clear from the case of the master not paying duties and from every other case on the subject. Barratry may be committed by the master alone, or by the sailors alone. Postlethwayt in his Dictionary of Trade and Commerce, vol. 1, p. 214, says:

> "Barratry is when the master of a ship or the mariners cheat the owners or insurers, whether by running away with the ship, sinking her, deserting her, or embezzling the cargo."

The owners or insurers are as much cheated and defrauded if the vessel is run away with by the sailors as if it is run away with by the master. But Postlethwayt in vol. 1, p. 136, title Assurance, gives a definition of barratry which applies more immediately to the present case. He says:

> "One species of barratry in a marine sense is when the master of a ship defrauds the owners or insurers by carrying a ship a different course to their orders."

The only two cases in the common law books that are worth mentioning are *Knight* v. *Cambridge* (1), and *Stamma* v. *Brown* (2). In the first of these cases it is held that barratry extends to every fraud of the master, and what is said at the conclusion of that case is the best doctrine that can prevail in insurances (1 Stra. at pp. 581, 582):

> "The end of insuring is to be safe at all events; and it would be very prejudicial if the court were to be making loop-holes to get out of policies. The insurer knows the master and whether he can trust him; and he that insures against his running away with the ship never imagined he might or would be guilty of any other fraud."

The principles of the second case apply very strongly to the present, for here there was a formed design to deceive the insured. The captain did not go to Guernsey for the benefit of his owners, but for his own benefit only, and in going there he acted inconsistently with his duty to his owners.

It has been said that it would be very extraordinary if the underwriter was to insure against the act of persons employed by the insured who were unknown to him (the insurer). As to that point, it is observable, in the first place, that this was a general ship, a circumstance which is much relied on among merchants and in this case is by them esteemed decisive on the present subject. There seems to be great reason for a distinction between a general ship, and one that is let to freight to a single person only. The former carries the goods of all mankind. Every man that chooses is at liberty to load his goods aboard her, and the merchant who ships his goods in such a vessel has no command over her. He does not hire

or employ the master; neither is the master subject to his order or direction during the voyage. But in the case of a vessel let to freight to one merchant only and by him alone freighted, he may be supposed to employ the master and have the direction of the vessel and the voyage. Therefore, whatever is done by the captain is to be considered as done by the merchant's servant.

But, secondly, it must be presumed that the master is known to the insurer; if not, it is the insurer's own fault, and he shall not avail himself of the want of such knowledge. Every policy specifies who is the master, and if the insurer agrees by his contract (as in policies is often done) that any other person at the election of the insured may go as master, that is waiving a personal knowledge of him, and no objection can then be made by the insurer for want of knowing who the master is. In this case Brown, who was the man that went as master, is the person mentioned in the policy.

If this question were tried by the laws of any other mercantile country it would hardly admit of a doubt: 2d. MAGENS. ORD. MIDDLEB., s. 14; ORD. ROTTERD., s. 52; ORD. AMSTERD., s. 6; ORD. HAMB., tit. 4, s. 6, tit. 5, s. 1, tit. 7, s. 1; ORD. STOCKHOLM, art. 5, s. 11, 16; art. 6, s. 14. There is no ordinance of Florence that applies immediately to this point, but from the form of their policies it may be collected what would be the determination of that place on the matter, for they insure against all perils, misfortunes, and other cases and accidents even such as cannot be thought of. And in their ordinances there is a provision that in case of a dispute the underwriter shall pay the money first and go to law afterwards. These ordinances are founded on good sense and sound reason when the nature of insurance is considered, and in mercantile transactions and such general subject as this is, no doubt the laws of other countries will have their weight in the courts of England. The end and meaning of an insurance is to enable one man, for a valuable consideration, to put another in his place to a certain amount for all risks and perils which the first man may sustain. All that is requisite on the part of the assured in these contracts is that they are made bona fide without fraud, concealment, or contrivance, and where that is done, the policies and ordinances of the different countries mentioned seem all to agree that every peril is insured against except such as happen by the means, consent, or privity of the insured. Insurances in England are not meant, either by the law or the parties, to be narrower or more confined than policies in other countries, and though, after a loss has happened, underwriters catch at every reed they can to avoid paying the insurance money, yet, if the question were put to them at the time of underwriting, even they would not hesitate to declare themselves liable for many accidents which are afterwards called into very serious debate.

Not long ago a question was made, whether the underwriter should be liable where the ship was not seaworthy, but the defect unknown to the insured. The underwriter succeeded, and was held not to be liable, but what was the consequence? A clause was inserted in the policies (as it is in the present) that any insufficiency in the ship not known to the assured should not prejudice the insurance, and the underwriters subscribed to this clause for the same premium as they did before without it. This is pretty strong proof what they would have said if they had been asked that question before they underwrote, though their opinions were altered after the loss had happened. It is also a proof that they considered their obligations to be as extensive as those of underwriters in other countries, and that they were answerable for all losses not occasioned by the means, consent, or knowledge of the insured.

On these authorities and for these reasons, it may be said, the going to Guernsey in the manner and for the purpose the master of this vessel did was barratry, and it is the more certain because the court said in the last term that, if this ship had been seized as forfeited on account of this smuggling transaction it clearly would have been barratry. The seizure could not be the act that constituted the barratry, but it must have been something preceding: namely, the going to Guernsey for an

illicit purpose and doing an act which subjected the ship and goods to seizure. For in the case of not paying duties (*Knight* v. *Cambridge* (1)) it does not appear that any seizure was actually made, but it was held barratry because the goods were liable to be seized.

Supposing this to be barratry, then the only question which remains is whether the loss that the plaintiffs have sustained was in consequence of that barratry. The best way of determining this question is to see whether the accident would have happened if the ship had never gone to Guernsey. It certainly would not, for the storm happened and the accident occurred before the ship got into her proper course to Helford. If she had not gone to Guernsey she would never have met with the storm. In the next place, suppose the ship had never gone to Guernsey but had pursued her proper course and the goods had been damaged in the manner they now were, what would have been the consequence with respect to the insured? They would have been entitled to a satisfaction from the insurers. What then shall excuse the insurers now? Shall the barratry of the master? There is nothing else to excuse them, but barratry, instead of excusing, makes the underwriter liable.

But (i) it is not necessary that the injury should be received in the very act of committing the barratry; and (ii) if it were, this injury was received during the act of barratry. What is the act of barratry? Running away with the ship for an illegal purpose. The instant the master had changed the course of the ship's voyage for the purpose he did, he committed barratry. Must the injury be received at the moment he varied his proper course, in order to charge the insurer? Suppose the injury had been received just before he got to Guernsey or in going into Guernsey, should not the underwriter be liable? And if liable for a damage done before he got into Guernsey, why shall he not also be liable for an injury sustained after he left Guernsey? If the insurer were to be discharged from this loss because it did not happen in the moment of the barratry's being committed, the condition of the insured would be unfortunate indeed, for, if it had not been for the barratry and the loss had happened, he certainly would have been entitled to the benefit of his policy. Therefore, his condition would be this: by means of the barratry of the master, which is one of the accidents he insures against, he would lose his goods, and the benefit of his policy likewise. But this injury was received during the act of barratry. The master went to Guernsey in order to take contraband goods aboard his vessel and smuggle them to England. At the time the loss happened he was bringing the smuggled goods to England, but he had not then completed his purpose and was at that time pursuing his barratical design.

For all or some of these reasons the plaintiffs would be entitled to the judgment of the court, even if the case had come on in a very different shape from what it now does. Here the question is whether the defendant is entitled through the favour and interposition of the court to a new trial, which the court will not grant, unless it be clear that the verdict is against law. If it be doubtful, the case ought not to undergo further litigation, for the case has already been tried by a special jury of merchants, among whom was a very considerable underwriter. They who are conversant with business of this kind have entertained no doubts, and the verdict given was with the entire approbation of the judge who tried the cause. Therefore, a new trial cannot be granted without reprobating the verdict that has already been given.

Alleyne for the defendant: Barratry occurs (i) where an injury is committed by the master and mariners which causes a confiscation; (ii) where a direct injury is done to the owners, with a direct intention to commit that injury. Though in the present case a small quantity of brandy was found on board the vessel, which was liable to confiscation, yet this cargo was found not to be so. Barratry means malpractice, or deceit, with respect to ships or goods: Savary, Dictionnaire de Commerce, tit. Barratry. Molloy (De jure Maritimo et Navali), Bk. 2, s. 13,

considers barratry as a malpractice against the cargo. POSTLETHWAYT, DICTIONARY OF TRADE AND COMMERCE, 214, says:

> "Barratry is where the master of a ship, or mariners, cheat the owners or insurers, whether by running away with the ship, sinking her, deserting her, or embezzling the cargo."

The act of the master is not insured against unless barratry is mentioned, and the underwriter is not liable unless the act of the master does amount to barratry. By the ORD. OF ROTTERD, 43, 52, it is provided that

> "owners shall not insure against the barratry of masters of their own appointment, but may against his neglect."

All the ordinances cited for the plaintiffs are open to the observation that they are positivi juris. If the doctrine laid down on the other side were to hold, every neglect of the master would amount to barratry. In *Johnson* v. *Proudfoot* (3), at the sittings in London, it was held that a ship staying in the West Indies till the hurricanes came on did not amount to barratry. [LORD MANSFIELD: That was held to be a deviation.] Every deviation is not barratry. In *Stamma* v. *Brown* (2), LEE, C.J., did not say what was barratry. In *Elton* v. *Brogden* (4), the crew opposed the captain and forced him to go contrary to orders, and yet that was held not to be barratry, but it was adjudged to be one of the accidents insured against, and so the insurers were liable. Therefore, a consequential injury is not within the meaning of barratry; it must be direct and designed. In the present case Darwin was not the owner, neither did he appoint the master. Lastly, it cannot be contended that this was done with a view to defraud the owners, because the captain's intention was only to get a little money himself, without injuring them.

LORD MANSFIELD, C.J.—The ground of the motion for a new trial in this case is that under the circumstances of the case as they were given in evidence to the jury the carrying the ship to Guernsey was merely a deviation but not barratry. Much more stress was laid at the trial than in either of the arguments upon the fact that, the deviation being with the knowledge of Willes the owner (though not owner pro hac vice) of the ship, it could never be barratry. The jury, therefore, were pressed to say whether it was with the consent of Willes or not, and they said it was. To be sure nothing is so clear as that, if the owner of a ship insures and brings an action on the policy, he can never set up as a crime a thing done by his own direction or consent. It was, therefore, a material fact to proceed upon, if Willes had had anything to do in the case, but he had not.

It appeared to me that the nature of barratry had not been judicially considered or defined in England with accuracy. In all mercantile transactions the great object should be certainty, and, therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other, because speculators in trade then know what ground to go upon. But it is not easy to collect with certainty from a general verdict, or from notes taken at nisi prius, what was the true ground of decision. Therefore, in this, as in all doubtful cases, I wished a case to be made for the opinion of the court.

It appears that there are but three common law cases relative to barratry. The first is *Knight* v. *Cambridge* (1) where the neglect of the captain in not doing his duty was adjudged barratry, for it was his duty to pay the port duties before the ship went out of port, and, he being guilty of neglect in not discharging them, it was adjudged to amount to barratry. The next is *Stamma* v. *Brown* (2), where the opinion of LEE, C.J., in his direction to the jury is very strong to the present case. The ship, being chartered, and having taken goods on board for a voyage directed to Marseilles, had passed by Marseilles, and, therefore, went out of the voyage. The Chief Justice in his direction told the jury that, this being against the express agreement to go first to Marseilles, seemed not to be a simple deviation only, but a formed design to deceive the contractor. The jury stayed out some

time, and on their return asked the Chief Justice whether, if the master was to have no benefit to himself by passing by Marseilles and went only to the other places for the benefit of the owners, it would be barratry? The Chief Justice answered it would not. Whereupon the jury found a verdict for the defendant. Upon a motion for a new trial it was refused because it appeared to the court that notice had been given to the agent of the plaintiff that the voyage was to be altered, and that he was at liberty to take his goods out of the ship if he disapproved of such alteration, and to make it barratry there must be something of a criminal nature as well as a breach of contract. The last common law case is *Elton* v. *Brogden* (4). In that case neither the terms of the first or second policy are stated and yet they must have been special. The only question seems to have been whether the capture of a second prize justified the second return of the ship to Bristol. The court held it did. If so, there could be no barratry because the captain and mariners acted to the best of their judgment for the benefit of the owners. Whatever excused the deviation, proved that the deviation could not be barratry. The circumstances which induced the court to be of that opinion are not stated.

These cases do not afford any precise definition of what barratry is. Therefore, I have considered of it, and consulted with men conversant in mercantile affairs, and I am now very clear. The first thing to be considered is what is meant by barratry of the master. I take the word to have been originally introduced by the Italians who were the first great traders of the modern world. In [FLORIO'S] ITALIAN DICTIONARY the word "barratrare" means to cheat, and whatsoever is by the master a cheat, a fraud, a cozening, or a trick, is barratry in him: nothing can be so general. Here the underwriter has insured against all barratry of the master, and we are not in a case of the owner or freighter being privy to it. If we were, nothing is so clear as that no man can complain of an act done to which he himself is a party.

In the present case all relative to Willes may be laid out of it. He is originally the owner, but not the insured here. Darwin was the freighter of the ship, and the goods that were on board were his. If any fraud is committed on the owner, it is committed on Darwin. The question then is: What is the ground of complaint against the master? He had agreed to go on a voyage from London to Seville. Darwin trusts he will set out immediately, instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to Seville. That is a cheat, and a fraud on Darwin, who thought he would set out directly, and whether the loss happened in the act of barratry, that is, during the fraudulent voyage or after, is immaterial, because the voyage is equally altered even though there is no other iniquitous intent. In the present case there is a great deal of reason to say that the loss sustained was in consequence of the alteration of the voyage. The moment the ship was carried from its right course it was barratry, and here the loss was immediately upon it. Suppose the ship had been lost afterwards, what would have been the case of the insured if not secured against the barratry of the master? He would have lost his insurance by the fraud of the master, for it was clearly a deviation, and the insured cannot come on the underwriters for a loss in consequence of a deviation. Therefore, I am clearly of opinion, that this smuggling voyage was barratry in the master.

ASTON, J.—I wonder that there should remain a doubt at this time of day what is meant by barratry in the master. In different ordinances different terms are used, but they all have the same meaning. In one of the ordinances of Stockholm it is called "knavery of the masters or mariners," and the facts stated in the present case clearly fall within that description. Where it is a deviation with the consent of the owner of the vessel and the master is not acting for his own private interest, in such case it is nothing but a deviation with the consent of the owner, and the underwriter is excused. In the present case the hulk of the ship belonged to Willes, but he had nothing to do with it, having chartered it to

Darwin. The jury, therefore, did right to consider Darwin as owner pro hac vice. Having considered him in that light, the conduct of the master was clearly barratry, for he was acting for his own benefit, and without the consent, or privity, or any intended good to his owner. Nobody knows when the first commencement of the injury happened, but most probably on the return of the ship to Dartmouth from Guernsey, where he had been for the purpose of smuggling. Therefore, I am clearly of opinion that this change of the voyage for an iniquitous purpose was barratry, which is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master by which the owners or freighters are injured.

WILLES, J.—The only doubt I had in this case was when the loss accrued, and I think it may reasonably be said to have happened in consequence of the smuggling voyage, for, if the ship had proceeded on her first intended course, she would have escaped the storm. Though this was a deviation, yet it is a just and fair rebutter to say that it was barratry in the master which is insured against in the policy. I think the justice of the case is on the side of the plaintiffs, and, therefore, that there ought not to be a new trial.

ASHHURST, J.—I continue of the same opinion as I held at the trial. I think the plaintiffs have a right to recover on either count in the declaration, first, for the loss at sea. For it does not lie in the mouth of the insurer to object on the ground of its being a deviation and so prevent the plaintiffs from recovering on that count, because the act of the master was a fraudulent act, and, if the loss is consequential upon such fraudulent act, it is barratry against which the party is insured. Therefore, the insurers shall not object upon a fact which is itself a forfeiture of the policy. Secondly, I think, for the reasons already alleged by my Lord Chief Justice and my Brethren, that it may fairly be said that the loss accrued in consequence of the barratry of the master. Therefore, I concur that the rule should be discharged.

WILLES, J., agreed with ASHHURST, J., that the plaintiffs were entitled to recover on either count.

Rule discharged.

LAKE *v.* CRADDOCK

[Lord Chancellor's Court (Lord King, L.C.), Michaelmas Term, 1732]

[Reported 3 P.Wms. 158; 24 E.R. 1011]

Equity—Preference for tenancy in common rather than joint tenancy—Purchase of property by partners.

Five persons as joint tenants purchased land from the Commissioners of Sewers intending to drain it. They contributed rateably to the purchase. One of them left the partnership and later the other four purchased in their four names other land which they considered would be useful to them in their undertaking. Several of the partners having died, an action was brought by a surviving partner for an account and a division of the partnership estate.

Held: the partners were to be treated in equity as tenants in common; the partner who had deserted the partnership was to be let in on condition that he paid a sum, with interest, which would make his contribution to the partnership equal to what had been contributed by each of the other partners.

Notes. Dispositions to tenants in common and limitations to joint tenants are dealt with by s. 34 and s. 36, respectively, of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 489, 494). Rules as to interests and duties of partners subject to special agreement are provided by s. 24 of the Partnership Act, 1890 (17 Halsbury's Statutes (2nd Edn.) 592); and there is a saving for rules of equity and common law by s. 46 (ibid., p. 605).

Considered: *Jackson* v. *Jackson* (1804), 9 Ves. 591; *Buckley* v. *Barber* (1851), 6 Exch. 164. Referred to: *Aveling* v. *Knipe* (1815), 19 Ves. 441; *Dale* v. *Hamilton* (1846), 5 Hare, 369; *Re Rowe, Jacobs* v. *Hind* (1889), 60 L.T. 596; *Steeds* v. *Steeds*, [1886–90] All E.R.Rep. 1021.

As to equitable jurisdiction in partnership, see 14 Halsbury's Laws (3rd Edn.) 499 et seq.; as to where equity prefers a tenancy in common, see ibid., p. 528; and for cases see 20 Digest (Repl.) 258. As to shares in partnership, see 28 Halsbury's Laws (3rd Edn.) 534 et seq.; and for cases see 36 Digest (Repl.) 541 et seq.

Appeal by the defendant from a decree of Sir Joseph Jekyll, M.R., on a bill by a partner against his co-partners for an account and division of the partnership estate.

A great part of the lands in West Thorock, in Essex having been overflowed by the river Thames near Dagenham, and the landowners not thinking it worth their while to pay the assessments made on them by the Commissioners of Sewers, the commissioners decreed the lands to be forfeited and conveyed them to three trustees in trust to sell and raise money for the draining of these overflowed lands. The defendant Craddock's father, the plaintiff Lake, and three others (five in all) entered into an undertaking to drain the level, or overflowed lands of West Thorock. By the consent and direction of the Commissioners of Sewers, the trustees for the sale, by deed dated Feb. 8, 1695, in consideration of £5,145 paid to the commissioners by the five purchasers, conveyed this level to the defendant Craddock's father, the plaintiff Lake, the three others and their heirs, upon which several sums of money were expended in carrying on the undertaking. In 1699 the defendant Craddock's father paid his last contribution, which, with what he had advanced before, came in all to £1,025. Afterwards, as it seemed that the enterprise would prove very expensive, and there being uncertainty as to its success, the defendant Craddock's father retired from it completely. The four other undertakers were advised that some neighbouring lands would be of service to their design, and in April, 1703, they purchased the manor of Porretshalls in West Thorock from Lady Smith for £2,550, and in February, 1704, they purchased the moiety of the rectory and tithes of West Thorock for £1,400 from Sir Charles Tyrrel. The two purchases were thought useful in the undertaking and were made

in the names of the four undertakers, omitting Craddock's father; it did not appear that he was consulted therein or desired to contribute to the purchase. Craddock's father died, leaving the defendant Craddock the son, heir and executor. The plaintiff, Sir Bibye Lake, one of the original partners, brought this bill against the rest of the partners, or their representatives, for an account and division of the partnership estate. When the case came on the Master of the Rolls referred it to the Master to state a Case for the judgment of the court. The Master made his report and the cause was heard on the question whether the five purchasers, having made this purchase jointly so as to become in law joint tenants, the same should survive in equity.

In 1729 **SIR JOSEPH JEKYLL, M.R.,** decreed that the survivorship should not take place, for the payment of money created a trust for the parties advancing it, and an undertaking upon the hazard of profit or loss was in the nature of merchandising, when the jus accrescendi was never allowed. Supposing that one of the partners had laid out the whole of the money, and had happened to die first, he must, according to the contrary construction, have lost all, which would have been most unjust. Wherefore it was decreed that the five purchasers were tenants in common, not only as to the level lands, which were first purchased, but also as to the lands bought afterwards by the four undertakers from Lady Smith and Sir Charles Tyrrell, but that the defendant Craddock ought not to have the benefit of this tenancy in common unless he would pay so much money as would make what had been already advanced by his father equal to what had been contributed by each of the other partners, together with interest from the respective times that his father ought to have made those payments. On the defendant Craddock's paying the same, all the lands were to be divided into five parts, the defendant Craddock to have one fifth, but, in default of payment the defendant Craddock was to be excluded, and the lands were to be divided into four parts and distributed among the four other partners.

The defendant Craddock appealed from this decree to Lord King, L.C., contending that he ought either to receive back the £1,025 which it was admitted his father expended in the undertaking or be allowed to come in for a share of the level only, and not be bound to contribute towards the two purchases made by the four other undertakers from Lady Smith and Sir Charles Tyrrell. As the four other undertakers had chosen to make these two purchases in their own names and so they seemed to have excluded Craddock's father from all concern therein. Had it proved beneficial, he would have had no means of forcing them to admit him to a share, and, therefore, now that it had turned out a losing bargain, there could be no reason to compel him to bear a proportion of the loss. Besides, there was nothing in the articles empowering the partners of the major part of them to buy lands, and by the same reason that they would oblige Craddock to pay his share towards these purchases, they might, if they had fancied buying half the country, have compelled him to contribute to that also. It was difficult to conceive how the land thus purchased, much less the tithes, could be of any use in the undertaking, though, as to the charge of draining the level exclusive of the two purchases, the defendant Craddock was willing to pay his proportion. It was further contended that the decree was unreasonable because it directed that the defendant Craddock, in order to be admitted to one-fifth, should pay not only his proportion of the two purchases, but also the interest of the purchase-money from the time that his father ought to have made these payments, whereas the direction ought to have been that an account should be taken of the profits of the two purchases, as the profits might have amounted to as much as the interest, or if not, that the defendant Craddock ought to pay no more towards such interest than the deficiency of the quantum the profits would come to.

For the plaintiffs it was argued that as Craddock's father and himself had for nearly thirty years relinquished and abandoned the partnership, Craddock had no manner of right thereto but through the indulgence of a court of equity, as it was

by law a joint tenancy, and as such belonged to the survivors. It was a decree favourable to him to let him in upon any terms, and the terms now offered him were reasonable. Had Craddock brought a bill for the benefit of the undertaking, he could not have hoped to succeed on any other conditions. It was still stronger against him that he now seemed to decline meddling with the undertaking, so that there was rather greater favour shown him than any hardship imposed. He was not absolutely and at all events bound by the decree to pay his proportion towards the new purchases, but had it in his election whether he would do it or not. As to the interest which was required of him previous to his being admitted into the partnership, it was reasonable that he should pay it for his default in not having contributed his share of the principal before, which, if he had done, he would not have been charged with the interest. This was some disadvantage to the other four partners, who had been deprived of their arrear of interest for nearly thirty-five years. The design of Craddock appeared to be to delay matters and to defer bringing in his money and interest till such time as this long account of the profits should be taken, which would require many years. If the defendant's share of the profits of these two purchases should exceed his proportion of interest, the surplus, on the making up of the accounts, must be paid to him.

LORD KING, L.C.—For the reasons argued for the plaintiffs, the decrees of Sir Joseph Jekyll, M.R. will be affirmed.

Appeal dismissed.

DEAN AND CHAPTER OF ELY *v.* WARREN

[Lord Chancellor's Court (Lord Hardwicke, L.C.), June 2, 1741]

[Reported 2 Atk. 189; 26 E.R. 518]

Custom—Manorial custom—Proof—Evidence of custom in neighbouring manor—Admission to explain or corroborate custom.

Although as a general rule evidence of the custom of a neighbouring manor is not admissible to show the custom of another manor because every manor is governed by its own customs, in some instances courts of law have admitted such evidence. For example, in the case of mining countries evidence has been admitted with regard to the profits of mines out of other manors, where they are analogous and similar, to explain or corroborate the custom of the manor. Similarly, in the present case, evidence was admitted to prove the right of copyholders to dig up the lord's soil for turf in fen country, for fens and marines were much the same throughout the country.

Commons—Turbary—Right to take sufficient turf for house to which common appendant—Right of tenant at will.

Per Lord Hardwicke, L.C.: The nature of turbary is very well known, which is nothing more than such a quantity of turves as may be sufficient for the house to which the common is appendant, but here the custom is laid, not only in the tenants, but the occupants, which is a very great absurdity, for the occupant, who is no more than a tenant at will, can never have a right to take away the soil of the lord.

Notes. Copyholds were abolished and became enfranchised land by Part 5 (ss. 128–137) of the Law of Property Act, 1922 (4 Halsbury's Statutes (2nd Edn.) 721 et seq.) which by s. 202 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 827) was deemed to have been effected immediately before the commencement of the Act of 1925.

Referred to: *Scrutton* v. *Stone* (1893), 9 T.L.R. 478.

As to common of turbary, see 5 HALSBURY'S LAWS (3rd Edn.) 315; and for cases see 11 DIGEST (Repl.) 16. As to manorial customs generally, see 8 HALSBURY'S LAWS (3rd Edn.) 275 et seq.) and for cases see 13 DIGEST (Repl.) 26. As to proof of local rights and customs in respect of minerals, see 26 HALSBURY'S LAWS (3rd Edn.) 797; and for cases see 33 DIGEST (Repl.) 913 et seq.

Bill in equity to prevent waste in digging and carrying away the soil in manors that lie in the levels in Cambridgeshire.

The question arose whether evidence of customs in a neighbouring manor was admissible to show the customs of the manor in question.

LORD HARDWICKE, L.C.—It is certainly the rule of law in general that the evidence of neighbouring manors shall not be admitted to show the custom of another manor because every manor is to be governed by its own customs. But this rule is not so universal as not to be varied in some instances. In mine countries, Derbyshire, etc., the courts of law have admitted evidence with regard to profits of mines, etc., out of other manors where they are analogous and similar, to explain or corroborate the custom of the manor in question. In the present case there is a great similitude in the manors, because this is a fen country, which is of very large extent, and the nature of fens and marines throughout England are pretty much the same. The custom here is, to dig up the lord's soil for turf which is a very old custom if applied to any other soil, but fenny and marshy lands are often overflowed, and lie buried under water for seven or eight years, and produce no profit at all to the copyholder, and, therefore, by way of compensation, when the water is drained, and the land improved from the additional soil brought by the floods, the copyholder may be entitled to common of turbary. This seems to be a plausible pretence for such a right, and, therefore, the evidence offered by the plaintiff must be read.

The nature of common turbary is very well known, which is nothing more than such a quantity of turves as may be sufficient for the house to which the common is appendant, but here the custom is laid, not only in the tenants, but the occupants, which is a very great absurdity, for an occupant, who is no more than a tenant at will, can never have a right to take away the soil of the lord.

The Court of Exchequer, where there has been an imperfect modus, have taken a short method, by decreeing the defendant to pay tithes; but this court will not put persons to set forth a custom with so much exactness as is requisite at law, or with so much nicety as the Court of Exchequer expects.

The custom in this case is so extraordinary, that if the evidence had not been very strong in the support of it, I should not have directed an issue to try the custom, but should have decreed an injunction to stay waste in digging up the lord's soil. Before the Act of Parliament 15 Car. 2, c. 17 (Bedford level) (1663) [repealed S.L.R. 1863] for the improvement of the great level of the fens, the lands in question were common, and then they might take away turf, but being severed by s. 38 of this Act and annexed to particular tenements, it might very probably lead the tenants into a mistake that they had the same right to dig turf after severance as before.

Order accordingly.

SLINGSBY'S CASE

[Court of Exchequer Chamber (Anderson, C.J., Manwood, C.B., Wyndham, Peryam and Rodes, JJ. (C.P.), Gent and Clarke, BB.), Michaelmas Term, 1587]

[Reported 5 Co. Rep. 18 b; Jenk. 262; 3 Leon. 160; 77 E.R. 77]

Deed—Covenant—Construction—Joint or several—Covenant with several persons—Several where several interests.

A covenant [made before 1926] with two or more persons is a several covenant where the interests of the covenantees are several and joint where their interests are joint.

Notes. The Law of Property Act, 1925, s. 81 (20 Halsbury's Statutes (2nd Edn.) 604) now provides for the effect of a covenant with two or more jointly (unless a contrary intention is expressed, see sub-s. (3)).

Followed: *Anderson* v. *Martindale*, [1775–1802] All E.R.Rep. 352. Considered: *Servante* v. *James* (1829), L. & Welsb. 54; *Hopkinson* v. *Lee* (1845), 6 Q.B. 964. Applied: *Keightley* v. *Watson* (1849), 3 Exch. 716. Referred to: *Eccleston* v. *Clypsam* (1668), 2 Keb. 338; *May* v. *Woodward* (1677), Freem.K.B. 248; *Spencer* v. *Durant* (1688), 1 Show. 8; *Johnson* v. *Wilson* (1741), Willes, 248; *Enys* v. *Donnithorne* (1761), 2 Burr. 1190; *Scott* v. *Godwin* (1797), 1 Bos. & P. 67; *Collins* v. *Prosser* (1823), 3 Dow. & Ry.K.B. 112 ([1814–23] All E.R.Rep. 143); *Withers* v. *Bircham* (1824), 3 L.J.O.S.K.B. 30; *Lane* v. *Drinkwater* (1834), 5 Tyr. 40; *Foley* v. *Addenbrooke* (1843), 4 Q.B. 197; *Bradburne* v. *Botfield* (1845), 14 M. & W. 559; *Haddon* v. *Ayers* (1858), 1 E. & E. 118; *White* v. *Tyndall* (1888), 13 App. Cas. 263.

As to construction of joint and several promises, see 8 Halsbury's Laws (3rd Edn.) 62. And as to construction of covenant affected by interests of covenantees see 11 Halsbury's Laws (3rd Edn.) 451; and for cases see 12 Digest (Repl.) 32 et seq. As to creation of tenancy in common by grant or devise, see 32 Halsbury's Laws (3rd Edn.) 339; and for cases see 38 Digest (Repl.) 817.

Appeal by the defendant, by way of writ of error in the Exchequer Chamber, from a judgment in the King's Bench in an action for breach of covenant for that the defendant was not seised of the rectory of Aldingfleet in the county of York as he had covenanted. The covenant was made by a tripartite indenture and the question arose whether it was joint or several.

The plaintiffs, Francis Slingsby and Frances, his wife, brought an action in the King's Bench against the defendant, Roger Beckwith and declared on an indenture tripartite between Roger Beckwith of the first part, William Vavasor, Francis Slingsby and Elizabeth, sister of Roger Beckwith, of the second part, and George Harvey, and Frances, then his wife, another of the sisters of Roger Beckwith, of the third part, and covenanted with William Vavasor and Francis Slingsby and with George Harvey and Frances, his wife and their assigns et cum quolibet et qualibet eorum, that Roger Beckwith at the sealing and delivery of the indenture was lawfully and solely seised of the rectory of Aldingfleet in the county of York. At the trial the jury found for the plaintiff and assessed damages upon which judgment was given to the plaintiff, in the King's Bench. The defendant appealed.

ANDERSON, C.J., of the Common Pleas, **MANWOOD, C.B.**, **WYNDHAM, PERYAM** and **RHODES, JJ.**, of the Common Pleas, **GENT** and **CLARKE, BB.**, resolved that the judgment was erroneous and allowed the appeal [states Sir Edward Coke in his report]. For it appears by the plaintiff's own showng in his declaration that the plaintiffs only cannot maintain an action of covenant, but the other covenantees ought to have joined in the action with them, notwithstanding the words et ad et cum quolibet et qualibet eorum. As to these words this difference was agreed. When it appears by the declaration that every of the covenantees has, or is to have, a several interest or estate, there, when the covenant is

made with the covenantees, et cum quolibet eorum, the words cum quolibet eorum make the covenant several in respect of their several interests. As if a man by indenture demises to A. blackacre, to B. whiteacre, to C. greenacre, and covenants with them and quolibet eorum, that he is lawful owner of all the said acres, etc., in that case in respect of the said several interests by the said words, et cum quolibet eorum, the covenant is made several; but if he demises to them the acres jointly, then these words cum quolibet eorum are void, for a man by his covenant (unless in respect of several interests) cannot make it first joint, and then make it several by the same or the like words, cum quolibet eorum. For although sundry persons may bind themselves et quemlibet eorum, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three, and to each of them to make it joint or several at the election of several persons, for one and the same cause, for the court would be in doubt for which of them to give judgment, which the law would not suffer, as it is held in Y.B. 3 Hen. 6. 44 B. There it appears that one brought a replevin against two persons for an ox, who made several avowries, each by himself in his own right; and there, by advice of all the justices, both the avowries abated for the inconveniency, that if both the issues should be found for the avowants, the court could not give judgment on them severally for one and the same thing. Also the covenantor in the case at Bar would be divers times charged for one and the same thing; and, therefore, the said words et cum quolibet eorum are in such case but words of amplification and abundance, and cannot sever the joint cause of action. And it was also resolved, that an interest could not be granted jointly and severally: as if a man grants proximam advocationem or makes a lease for years of land to two jointly and severally, this word severally is void, and they are joint tenants. So if a man makes a feoffment in fee by deed to three, and warrants the land to them et cuilibet eorum, this warranty is joint and not several: but in such case, if their estates were several, their warranty should be several accordingly: but a power or authority, as to make livery or to sell, etc., may be joint and several, for there they have not any interest or action, but are as servants to others. And for this error the judgment was reversed.

Appeal allowed.

A

PUSEY *v.* DESBOUVRIE

[Lord Chancellor's Court (Lord Talbot, L.C.), Trinity Term, 1734]

[Reported 3 P.Wms. 315; 24 E.R. 1081]

B *Election—Ignorance of law—Legacy—Grant on condition that legatee's right to sum of money be released—Avoidance of release.*

A person is not bound by an election which he has made unless when making it he was aware of his rights regarding the subject-matter of the election.

So, where the daughter of a testator accepted a legacy on condition that she released her right to a sum of money, she then being ignorant of the law relating to the matter, it was **held** that on further hearing she might be entitled to a decree avoiding the release.

C

Notes. Referred to: *Salkeld* v. *Vernon*, *Salkeld* v. *Salkeld* (1758), 1 Eden, 64; *Clifton* v. *Cockburn*, [1824–34] All E.R.Rep. 181; *Lee* v. *Head* (1855), 26 L.T.O.S. 12.

As to election, see 14 Halsbury's Laws (3rd Edn.) 588 et seq., and for cases see
D 20 Digest (Repl.) 425 et seq.

Bill to set aside a release made by a legatee.

Sir Edward Desbouvrie was a freeman of London and possessed of a very great personal estate. He had a wife, with whom he had compounded as to her customary part, and a son (the defendant) to whom he had given very considerable sums of money in order to enable him to trade. He had also one daughter. He
E made his will giving (inter alia) to his daughter £10,000 on condition that she should release her orphanage part together with all her claim or right to his personal estate by virtue of the custom of the city of London, or otherwise, and made the defendant his executor, his daughter being about the age of twenty-three years. After the testator's death, it was agreed between the daughter and the defendant
F that she should accept of her legacy of £10,000 and on the terms whereon it was given her by her father's will, that is, she to release all her right by virtue of the custom, etc., which release was accordingly prepared. Before she executed it, the defendant informed her that she had it in her election to have an account of her father's personal estate and to claim her orphanage part, and her uncle was then present. But she at that time declared she would accept of the legacy left her by her
G father, that being a sufficient provision for any young woman, and thereupon she executed the release, being then about twenty-four years old, and the defendant paid to her the £10,000 and interest. She afterwards married the plaintiff, an attorney-at-law, who brought a bill to set aside this release, charging that the personal estate of which the father died possessed was much above £100,000, the daughter's share of which by the custom would amount to upwards of £40,000;
H that the mother having been compounded with for her customary part, the freeman's personal estate was to be distributed as if there was no wife, consequently the dead man's part was one moiety, and the children's part the other; and that the brother, the defendant, had been advanced in his father's lifetime by his father at different times with several great sums of money, the whole whereof would amount to a full advancement of the son, so that the plaintiff, in right of the
I daughter, his wife, was entitled to a moiety of her father, the freeman's personal estate. The defendant pleaded this release.

LORD TALBOT, L.C.—I do not see that any manner of fraud has been made use of in this case, but still it seems hard a young woman should suffer for her ignorance of the law or of the custom of the city of London, or that the other side should take advantage of such ignorance.

I remember well that in this very case where the wife has been compounded with as to her customary part, not only the counsel have differed but the court themselves have varied in their determinations. It has, for instance, been held

and determined by the court that, if the husband, a freeman of London, has compounded with the wife before the marriage as to her customary part, this being the husband's own purchase, he ought to have as well his wife's customary part as his own; but now a different resolution seems to have prevailed, viz., that, where the wife is compounded with before marriage, it should be taken as if there was no wife, and consequently the testator shall have one half and the children the other. And if the court themselves have not, until very lately, agreed in what shares or proportions these customary parts shall go, the daughter, surely, might be well ignorant of her right and ought not to suffer or give others any advantage by such her ignorance. Neither can it be inferred with sufficient certainty what the father recommends in this case; he rather seems to leave it to his daughter's option either to claim her customary part or release her right thereto and accept the legacy.

It is true that it appears that the son, the defendant, did inform the daughter that she was bound either to waive the legacy given by the father or to release her right by the custom; and so far she might know that it was in her power to accept either the legacy or orphanage part. But I hardly think that she knew that she was entitled to have an account taken of the personal estate of her father and first to know what her orphanage part did amount to; and that, when she should be fully apprised of this, then, and not until then, she was to make her election, which very much alters the case, for probably she would not have elected to accept her legacy had she known or been informed what her orphanage part amounted to before she waived it and accepted the legacy.

It would give light into this cause to know what might be the value of the father's personal estate at his death, and (if the parties think fit) what was the value thereof when the will was made, because it has been said to have been increased by the father between the time of making his will and his death, and also to know what the defendant has received in his father's lifetime from his father for or towards his advancement.

Therefore, let the plea stand for an answer, saving the benefit thereof until the hearing; and let the defendant answer not as to particulars (for that I do not expect) but by way of computation in gross as to these points.

A

VERNON *v.* VAWDRY

[Lord Chancellor's Court (Lord Hardwicke, L.C.), January 24, 1740]

[Reported 2 Atk. 119; Barn. Ch. 280; 2 Eq. Cas. Abr. 12; 26 E.R. 474]

B *Trustee—Breach of trust—Simple contract debt.*

A breach of trust is considered in equity as giving rise to but a simple contract debt.

Trustee—Account—Stated account—Fraud—Re-opening of account—Account of long standing.

C Where fraud appeared in a stated account, the whole was deemed to be opened notwithstanding that it was of twenty-three years' standing.

Notes. Applied: *Allfrey* v. *Allfrey* (1849), 1 H. & Tw. 179. Referred to: *Adey* v. *Arnold* (1852), 2 De G.M. & G. 432; *Holland* v. *Holland* (1869), 4 Ch. App. 450, n.

As to liability for breach of trust, see 38 Halsbury's Statutes (2nd Edn.) 1040 D et seq.; and for cases see 47 Digest (Repl.) 471 et seq. As to settled accounts, see 14 Halsbury's Laws (3rd Edn.) 488 et seq.; and for cases see 20 Digest (Repl.) 289 et seq.

Bill brought by the plaintiff for, inter alia, an account to be taken of rents and profits of the estates of Henry Vernon, deceased, which the defendant's late husband, Richard Vernon, had received.

E

LORD HARDWICKE, L.C., in the course of his judgment, said: A breach of trust is considered but as a simple contract debt . . . and the particular circumstances of a case ought not to vary the rule.

If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify, but if it is apparent to the F court that there has been fraud and imposition, the decree must be that the whole shall be opened, notwithstanding it was a stated account of twenty-three years standing, and Mr. Richard Vernon, who was guilty of the fraud, is dead likewise.

LORD TOWNSHEND *v.* WINDHAM

[Lord Chancellor's Court (Lord Hardwicke, L.C.), July 13, 16, 1750]

[Reported 2 Ves. Sen. 1; 28 E.R. 1]

Administration of Assets—Debt owed by testator—Assignment by tenant for life to trustees of profits of estate to pay debt by instalments—Death of tenant before whole debt paid—Availability of arrears of profits towards payment of debt.

A tenant for life assigned to trustees for twenty-one years if he should so long live the rents and profits of his real estate and certain dividends to pay £1,500 a year to a creditor in satisfaction of his debt. It was provided that, if the testator died before the whole debt was paid, the trustee should apply arrears of the rents and profits and of the dividends accruing due towards satisfaction of the balance of the debt still owing.

Held: this created a specific lien on the arrears for the payment of the debt, and they did not form part of the general assets available to other creditors.

Administration of Estates—Debt owed by testator—Payment—Availability of fund appointed by testator under a power.

A tenant for life, the remainder being to his sons in tail male and then to his nephew, he being without any son, by a voluntary conveyance permitted the nephew to have immediate possession of the estate, the nephew covenanting that, if by the testator's death without male issue it should happen that he (the nephew) should come into possession of the estate, he would permit such person as the testator should appoint to receive the rents and profits of the estate for a specified period. Subsequently, the tenant for life made an appointment in favour of his daughter.

Held: the appointed fund was subject to be applied for the benefit of creditors.

Husband and Wife—Paraphernalia—Death of husband—Property of wife—Liability to husband's debts—Pin money—Arrears—Death of husband—Wife's right to one year's arrears.

On the death of a husband paraphernalia becomes the property of the wife subject to it being liable for the husband's debts in the absence of other assets available to his creditors. If a wife's pin money be in arrear at the time of her husband's death, she can only recover the arrears accruing due during one year before his death.

Chose in Action—Assignment—Covenant entered into for valuable consideration.

A covenant entered into for valuable consideration is a chose in action and as such is capable of assignment.

Notes. Considered: *Holmes* v. *Coghill* (1806), 12 Ves. 206; *Holloway* v. *Millard* (1816), 1 Madd. 414; *Scarf* v. *Soulby* (1849), 1 H. & Tw. 426; *Ewart* v. *Ewart* (1853), 11 Hare, 276. Distinguished: *Re Roper*, *Roper* v. *Doncaster* (1888), 39 Ch.D. 482. Considered: *Re Guedalla*, *Lee* v. *Guedalla's Trustee*, [1904–7] All E.R.Rep. 1012; *Re Hadley*, *Johnson* v. *Hadley*, [1909] 1 Ch. 20; *Re Phillips*, *Lawrence* v. *Huxtable*, [1930] All E.R.Rep. 165. Referred to: *Ward* v. *Shallet* (1750), 2 Ves. Sen. 16; *Hurst* v. *Winchelsea* (1759), 2 Keny. 444; *Doe d. Otley* v. *Manning* (1807), 9 East. 59; *Thorpe* v. *Goodall* (1811), 17 Ves. 460; *Platt* v. *Routh* (1840), 6 M. & W. 756; *Patch* v. *Shore* (1862), 2 Drew. & Sm. 589; *Re Power*, *Re Stone*, *Acworth* v. *Stone*, [1901] 2 Ch. 659; *Re Dixon*, *Penfold* v. *Dixon*, [1902] 1 Ch. 248; *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231.

Cases referred to:

(1) *Lassells* v. *Lord Cornwallis* (1704), 2 Vern. 465; Prec. Ch. 232; 23 E.R. 898; sub nom. *Lord Cornwallis's Case*, Freem. Ch. 279; 12 Mod. 614; 37 Digest (Repl.) 339, *829*.

(2) *Shirley* v. *Lord Ferrers* (1733), see 7 Ves. 503, n.: Cas. temp. Talb. 2.
(3) *Bainton* v. *Ward* (1741), 2 Atk. 172; cited in 2 Ves. Sen. at p. 2; 7 Ves. 503, n.; 26 E.R. 507, L.C.; 23 Digest (Repl.) 533, *5981*.
(4) *Countess of Coventry* v. *Earl of Coventry* (1724), 2 P.Wms. 222; 1 Stra. 596; Gilb. Ch. 160; 9 Mod. Rep. 12; 1 Eq. Cas. Abr. 348, pl. 19; 2 Eq. Cas. Abr. 660, pl. 8; 24 E.R. 707, L.C.; 40 Digest (Repl.) 642, *1344*.
(5) *Earl of Huntington and Lord Mountjoye's Case* (1589), 4 Leon. 147; *Moore* K.B. 174; 74 E.R. 786; sub nom. *Lord Mountjoy and Earl of Huntington's Case*, Godb. 17; 5 Co. Rep. 3 b; 1 And. 307; 17 Digest (Repl.) 412, *2173*.

Bill filed by the creditors of the testator, Joseph Windham for an account and satisfaction out of his assets, and to have the several claims of the defendants discussed.

The first claim was by John Windham, executor and son-in-law of the testator, as creditor by judgment in two instances—the first to secure to him payment of £5,000 the portion of his wife, the testator's daughter, the other was given by way of security for the balance of an account, stated with John Windham by the testator about seven days before his death. The next claim was by Catherine Windham, the testator's daughter. He, being entitled to a very large estate for life, remainder to his first and every other son in tail male, remainder to his nephew William Windham in tail, with limitations over, and having only daughters, no sons, nor a probability of any, in 1734, after the marriage of William, executed an indenture of demise in performance (as it set forth) of certain promises and agreements made by the testator before the marriage, and in consideration of natural love and affection to his nephew he let him have possession immediately of part of his estate without paying anything for it, but William thereby covenanted that if by the testator's death without issue male it should happen that William or any of the heirs of his body should come into possession of the estate, he would permit such person as the testator should by deed or will in his lifetime appoint for that purpose, to enter and receive the rents and profits of the estate for so long a time as William should enjoy it in the testator's life. In 1742 the testator by a deed directed all and singular the lands, tenements, manors, and hereditaments, and all his estate, title right, and interest, to St. Comyns, his heirs, executors, administrators, and assigns, to take the rents and profits thereof from and immediately after the death of testator, in trust nevertheless to and for the sole and separate use of Catherine, her heirs, executors, and administrators. The testator died in 1746. The question was whether this twelve years interest in William's estate was part of the assets of the testator, or a good appointment to his daughter.

For the plaintiffs it was argued: This is part of his personal assets. A general power is so considered in this court, if executed without valuable consideration (let it be to whatever persons or uses) because it is that over which he has an absolute property, and shall not, therefore, give away from his creditors after his death. If it is to limit only to particular persons or uses, that, when exercised, is not assets because to a particular use: *Lassells* v. *Lady Cornwallis* (1), but more precisely laid down in several subsequent determinations, the strongest of which was *Shirley* v. *Lord Ferrers* (2), where' though appointed to a daughter, it was held assets because it was a general power over £5,000 and no more valuable consideration as to this appointee, than there. In *Bainton* v. *Ward* (3), George Ward, having power by deed or will to charge the premises with any sum not exceeding £2,000 by will taking notice thereof, devised to his mother £500, to the plaintiffs £1,000, to his wife the other £500 with the residue of his real estate, making her executrix, charging according to his power. Your Lordship held that, being a general power to raise the money as he pleased, it was part of his personal estate in respect of the general creditors, notwithstanding he had appointed to particular persons who could only take as specific legatees to have the other personal estate first applied, and that *Shirley* v. *Lord Ferrers* (2) was in point. No power can be more general than the present as to persons and uses, and he might have

sold or mortgaged this property, though he could not actually enjoy it in his life. If no appointment, it would have gone to the general assignees at law of the testator, the old ownership resulting.

For the defendant Catherine: This being to arise on a contingency after the testator's death, there are no words in the conveyance reserving the estate to him, nor of covenant to his executors, but merely to such as he shall appoint, which alone makes it different from the cases cited. If no appointment, it could not devolve on his representatives. On a tenant for life with power to charge with £100 becoming bankrupt, LORD KING held it was merely a power, not such an interest as would pass to the assignees. But supposing it might be called his estate by his power of appointment, it will not fall under those cases, because he determined his power in his life, and could make no subsequent appointment. It was the same as if he had given so much money to his daughter, appointing the benefit of it to her immediately on the contingency. In all the cases there was a subsisting estate in the party; in this the whole is passed away. One, though indebted, may dispose of a part of his personal estate to a child. If there is no authority in point, this is the severest case to make one. It was long before the court would determine the trust of terms for years to be assets, though now, this court following the law, it is so. Here the daughter may be said to be a creditor. As it cannot be made assets in point of law so that they must come here, the court will not act at all, nor take this away in so hard a case from a daughter otherwise unprovided for. It is to be considered as if an action was brought and whether within the Statute of Elizabeth, as made through fraud to retard recovery of debts, nothing of which is here, for, if the original deed is not fraudulent, the derivative cannot be so: 2 BULS. 218 [sic]. There is no suspicion from the situation of the testator or his daughter, or the transaction itself, he not continuing to receive the profits, nor retaining possession, nor a power of revocation, nor made without intervention of a third person, nor could the creditors affect it, if no appointment was made at all. It is only a contingent interest, not forfeitable for treason. The ground of the claim is that the court will decree execution of the power if the appointment was out of the case, but it falls not within the rules to decree such a power as this. There is a difference between a non-execution and a defective execution, nor are powers of equitable jurisdiction unless as it is a better remedy. In *Lassells* v. *Lady Cornwallis* (1) the money was actually raised, and in transitu the court will lay hands on it when it comes into executors hands having all the quality of assets. If this appointment had been executed by will it might be assets, having all the qualities of a will, but being by deed, has all the qualities of a deed; it is irrevocable, no lapse, etc.

The next claim was by the defendant Mr. Pratt, to a particular kind of security on certain arrears of rent and dividends, due at testator's death, under a deed executed by testator on Dec. 17, 1745. Pratt was a considerable creditor of testator, arising on a breach of trust upon not having accounted with him for the residuary estate of his uncle, which debt amounted to £6,472, and by the said indenture the testator assigned to Comyns, his executors, etc., for twenty-one years, if the testator should so long live, from Christmas then next, on trust to receive the rents and profits of his estate, and dividends that should arise on his funds, and to pay thereout particular instalments of £1,500 a year to Pratt, towards satisfaction of that debt, and afterwards for the testator, but, if the testator died before the whole sum was paid, by this particular provision, the trustee should stand entrusted to apply the rest and residue of the dividends, rents, and profits of the estate and funds that were due at making the assignment and that should accrue due after the time of making the conveyance towards satisfaction of the residue of the debt. It was insisted that he was entitled to whatever arrears were due, as vested in his trustee for him, for that those which were not received by the testator, were no part of his personal assets, that this was a covenant on contingency, and being the case of a personalty, it was not like land, where a precise form is necessary to give a right. There was a case before SIR JOSEPH

Fraud means, not only a crime, but any wilful fault or evil design, and even a neglect, provided it be crossa negligentia, will amount to barratry; which was the case of a master sailing out of port without paying duties: *Knight* v. *Cambridge* (1). That case approaches the nearest to the present of any that can be found, and even goes beyond it. That was merely a neglect, and might have been by accident as well as design, but because it subjected the ship to forfeiture it was held to be barratry. In this case the consequence was the same, for the act of the captain subjected the ship and the goods insured to forfeiture, but the act done was infinitely worse. It did not rest merely in a non-feasance, but was a formed premeditated scheme of running away with the ship out of the course of the voyage, done for an illegal purpose, for his own private benefit, without any excuse or necessity, and neither for the benefit nor with the knowledge of the owner or freighter.

One definition of barratry given at the Bar was where the master and mariners conspire together to run away with the ship. That certainly is one species of barratry, but it can never serve as a general description of it. If it were, barratry could never be committed without the concurrence of the mariners as well as the master, the contrary of which is clear from the case of the master not paying duties and from every other case on the subject. Barratry may be committed by the master alone, or by the sailors alone. Postlethwayt in his Dictionary of Trade and Commerce, vol. 1, p. 214, says:

> "Barratry is when the master of a ship or the mariners cheat the owners or insurers, whether by running away with the ship, sinking her, deserting her, or embezzling the cargo."

The owners or insurers are as much cheated and defrauded if the vessel is run away with by the sailors as if it is run away with by the master. But Postlethwayt in vol. 1, p. 136, title Assurance, gives a definition of barratry which applies more immediately to the present case. He says:

> "One species of barratry in a marine sense is when the master of a ship defrauds the owners or insurers by carrying a ship a different course to their orders."

The only two cases in the common law books that are worth mentioning are *Knight* v. *Cambridge* (1), and *Stamma* v. *Brown* (2). In the first of these cases it is held that barratry extends to every fraud of the master, and what is said at the conclusion of that case is the best doctrine that can prevail in insurances (1 Stra. at pp. 581, 582):

> "The end of insuring is to be safe at all events; and it would be very prejudicial if the court were to be making loop-holes to get out of policies. The insurer knows the master and whether he can trust him; and he that insures against his running away with the ship never imagined he might or would be guilty of any other fraud."

The principles of the second case apply very strongly to the present, for here there was a formed design to deceive the insured. The captain did not go to Guernsey for the benefit of his owners, but for his own benefit only, and in going there he acted inconsistently with his duty to his owners.

It has been said that it would be very extraordinary if the underwriter was to insure against the act of persons employed by the insured who were unknown to him (the insurer). As to that point, it is observable, in the first place, that this was a general ship, a circumstance which is much relied on among merchants and in this case is by them esteemed decisive on the present subject. There seems to be great reason for a distinction between a general ship, and one that is let to freight to a single person only. The former carries the goods of all mankind. Every man that chooses is at liberty to load his goods aboard her, and the merchant who ships his goods in such a vessel has no command over her. He does not hire

or authority against it, I will support it as far as I can, and here the plaintiffs, who are creditors, combat with a creditor. It is no more, as this was to arise at the testator's death, than a covenant to give a particular preference to one creditor before another, out of part of the general assets of the debtor. The general reasoning is right, that no debtor can by will or other act give a creditor a preference different from what the rule of law or equity would, over other creditors, out of his general assets, but the question is whether that will lie in the present case. First, as to there being no assignment, a distinction arises there between the arrears due before this conveyance made, and such as became due after making the assignment. As to the latter, the estate itself is assigned. Therefore, as to the rents and profits and dividends accruing after the assignment made, the interest in them can hardly be called the legal interest in the dividend of the stock, but as to the profits of the land, the legal interest was vested in trustees, and this covenant must be taken as a declaration of the trust of that for the benefit of Pratt, the creditor.

The question next arises on such of these arrears as were not formerly assigned, but rest merely on the covenant, that is, such as were due at the time of making the assignment, and it is to be considered whether this covenant does not amount to an assignment in equity, being for valuable consideration. I am of opinion that it does. In equity a chose in action may be assigned for valuable consideration, and that covenant being for valuable consideration, this court will consider, as if it had been done and as an assignment of the thing itself. There are several instances where covenants of choses in action are considered as assignments, often in the case of lands, as was the great case of Lord Coventry [*?Countess of Coventry* v. *Earl of Coventry* (4)]. A covenant, therefore, for valuable consideration will operate in this court as an assignment.

As to the objection from uncertainty leaving it in the power of the covenantor to receive or to dispose of it. In this court it is in the power of a man to prefer one fair and just creditor before another, and there may be just reason to do it from the nature of the debts and demands, and there can hardly happen a stronger case where it is incumbent on a man to provide for the payment of a debt than this. None can prefer one creditor by covenant out of his general assets, but he may lay hold specifically of part of his assets, and that though it is to become part of his estate after his death, or eo instante part of his assets, as he may assign bottomry bonds, or policies of insurance, or any interest, without any objection from being a contingency which may be assigned as well as anything else. Suppose it was an interesse termini not to take place until after his death, he might assign it without its being said to interrupt the course of administration. I am of opinion upon this covenant he could only receive the money, but he could not assign it de novo by notes on the tenants, so as to defeat a prior assignee or covenantee. Consider to what this is applied, it arising from the nature of the thing, from the ordinary course of payment of the rents and profits, not upon the intent to leave it fraudulently in the debtor's power to receive or not, and for that a letter written by the testator to the trustee will be material, the meaning of which letter was that there would be, whatever industry used, a great arrear in the hands of the tenants, and he would assign the benefit of that arrear in case of death before the debt paid by the £1,500 a year. There was no unfairness in this, nor is there any rule of law or equity, that a man may not make an assignment to a real creditor for valuable consideration of such arrears as shall be due at his death upon such a particular farm. What reason is there for a court of equity to set it aside, unless some apparent intention to leave it in the power of the testator to do otherwise with it? The assignment, therefore, will take effect as to the £1,500 a year and the arrears due at making the assignment, and afterwards over and above, although I fear they will fall greatly short of paying the debt, and they are not part of the general assets.

As to the paraphernalia, the rule of law is that where the husband dies indebted, the wife is not entitled thereto. In Cro. Car. there is a case that the wife was

entitled only to one gown. This court has gone on a more favourable rule, and reasonably so, to let the wife in upon other funds, but there is no other fund here upon which she can come at it, unless as a creditor for the arrears of her separate estate received by her husband who was indiscreetly made one of the trustees. But she must be a creditor by simple contract, and as the estate comes out that would not help her much. As in the case of pin money, a wife suffering her husband to receive the rents and profits of her separate estate cannot come for it afterwards and is allowed only to come in as a creditor for one year's arrear of pin money. The same holds as to this. But it is said, he bought jewels, and if the husband in possession of the rents and profits of her separate estate bought and gave to her the jewels, I should take it the equitable construction would be that it was like paying her the money of her separate estate. If, indeed, he bought them before he was in receipt of her estate, it would not do certainly. I cannot follow the money to be sure. She is not entitled to retain these jewels as her paraphernalia unless there should be any after-payment of the debts, but let the Master inquire at what time the husband came into possession of her separate estate, the yearly value thereof, and also whether he gave her any and what jewels while he was so in receipt, at what time given, and their value.

I own that, as to the other part of the case relating to Catherine Windham, I am in doubt. This court has certainly (and it is its office) extended the remedy of creditors as far as is consistent with justice, and the cases have gone a great way on that. I have generally taken it that *Shirley* v. *Lord Ferrers* (2) went further than the former cases, but as it was an authority of LORD TALBOT'S, and in favour of creditors, I have followed it since. I should not, however, be willing to go further than that, nor am I quite satisfied that this falls directly within it. I do not know but this may be an interest in the land itself, and then that authority is out of the case. But I have not formed an opinion, and will look into the cases and authorities. It may be a hard case upon her, should it be against her, but I must not make a precedent that men may make a provision for their families in prejudice of creditors.

July 16, 1750. **LORD HARDWICKE, L.C.**—The general question is whether the defendant Catherine is entitled in this court to retain the appointment made to trustees for her benefit out of the estate of William Windham, or whether that interest or power, that had been acquired by the testator is, notwithstanding that appointment, to be considered as part of the general assets of the testator. To determine this it must be considered what is the nature of the interest or power the testator had in that part of his estate. It arises on a very particular transaction, such as there is not a likelihood of another of the kind, but as to this question it will depend on the general rule, and whatever inclination one might have to preserve the benefit of a transaction of this kind to a daughter, said to be left unprovided for (though there is no proof of that), it must not be done so as to break in upon principles and rules established which would be perilous in future instances. The testator had a mind to do something for his nephew in his life, yet not absolutely without leaving it by way of retribution. The nephew's interest in the estate was a remainder in tail expectant upon an estate for life in the testator, subject to let in the contingent remainders to his sons if there should be any. The method taken was this, to let the nephew into possession of part of this large estate immediately, not paying anything for it, but if he or any heirs of his body happened to come into possession of the estate upon the testator's death, the testator should have power of taking back so long a time as William should enjoy it in the testators' life. It was an uncertain term, and uncertain profits. The testator intended to make a provision for his daughter out of it, as part of her fortune, and for her preferment, which he does in trust for her separate use.

It is insisted for the plaintiffs that this is such a kind of interest granted as the testator would be entitled to the benefit of, although he had no particular appointment, but on consideration I am of opinion that without making a particular

appointment, neither he, nor any in his place, could have any benefit of this covenant, for, taking it in any light, it must be considered as a covenant or grant of the interest in the land. Perhaps it partakes of both, but, considering it as a covenant, what action of covenant could have been maintained by the executors of the testator upon this deed until appointment made by the testator? The very words show there could be none. Considering it in another light, as a grant of the interest in the land, it was such as could not take effect until he made an appointment, for until then there was really no grant. If there had been a person named appointed in the deed, as if it was to deliver possession, and let any other particular person receive the rents and profits, I should have been of opinion that this had operated not barely as a covenant, but as a grant or kind of demise of the term or chattel interest to take effect in possession out of his remainder in tail, when that remainder took effect in possession. That has been determined in several instances—that, though it is by way of covenant, it operates the other way, which was *Earl of Huntington and Lord Mountjoye's Case* (5), so in 3 Leon. 305 [sic], in POLLEXFEN's time, that it was a grant of a way, not operating as a covenant. Here no person was named at the time, but when the testator came to execute the power and nominate an appointee then it became complete and operated as a grant of the land for that chattel interest to take effect out of his remainder in tail from that time. Like all other powers where there is a conveyance of an estate to such uses as another shall appoint, when appointed it takes effect out of the original grant. This being the nature of the interest granted, it falls in with the intent of the parties, which was not on either side, that in all events the uncle should take so much out of the nephew's estate as the nephew had the benefit of out of his estate for life. If that was the meaning, they would not have put it in this shape, but made it so directly, but the meaning was to leave it in the uncle's power or option to make use of it or not, for perhaps his circumstances might be such as he would have no occasion to do it.

The next consideration is, supposing this was not such an interest as could take effect until the power was executed and that without particular appointment the executors of the testator could have no benefit, whether this differs from the other cases on the execution of general powers where executed by the party, as *Shirley* v. *Lord Ferrers* (2) and others which have established the doctrine that where there is a general power of appointment of a sum of money to charge the estate of a third person, which it is absolutely in his pleasure to execute or not, he may do it for any purpose whatever, and appoint the money to be paid to himself or his executors, if he pleases. If he executes it voluntarily without consideration for the benefit of a third person, this shall be considered as part of his assets, and his creditors have the benefit of it. Nor does it differ whether it is a power to charge a sum of money on land or to create a chattel interest out of land, for it will depend on the same foundation provided it is a general power which he may execute for any purpose, for if it is a power to appoint a sum among other persons who are at all described by the power, so that it is not absolutely in his power to do it for himself, there is no pretence that his creditors could have the benefit of it. Consider how the present differs from any of those cases. Notwithstanding I have endeavoured to find a difference, I do not see a substantial one to ground a different rule upon in point of justice. The rules of this court are established as far as they can in favour of just creditors, and to prevent persons having powers from disposing thereof voluntarily to defeat creditors, and the court has extended it of late, and though an unfortunate case may arise in the case of children for whom parents are bound by nature to provide, it is impossible to say that the consideration in respect of them is of so high a nature as that of paying just debts, and, therefore, the court never preferred them to just creditors, who might otherwise be defeated of a satisfaction for their debts.

On that ground was *Shirley* v. *Lord Ferrers* (2), which has been allowed ever since, and is agreeable to *Lassells* v. *Lord Cornwallis* (1). A distinction was endeavoured that the appointment by Lord Ferrers was by will, whereas this is by

deed, because whoever takes by will takes as a legacy, but that is not a material distinction, for, if established, the justice intended by the court in these cases would be avoided in every instance, as then it would be putting it barely on the form of the conveyance and elude the rule of justice. Nor is there any substantial ground for this distinction, for, if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment, not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will. It is, therefore, a flight and shadow of distinction only.

Consider the result. This is rather stronger in favour of creditors than those cases where there has been barely an appointment of sums under a power, this appointment operating as a conveyance of the chattel interest in the land to Catherine Windham, to trustees for her benefit, the testator being indebted at that time. If so (and so it is taken by the drawers of the deed) how does it stand on the foot of the statutes? There is no case where a person indebted makes a conveyance of a real or chattel interest for benefit of a child without the consideration of marriage or other valuable consideration, and dying indebted afterwards, that that shall take place. There is certainly a difference between the Statutes of Fraud, 1571, which is in favour of creditors and the Statute of Fraud, 1584, which is in favour of purchasers. But that difference was never suffered by way of general rule to go further than this. Under the Act of 1584 every voluntary conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent purchase for valuable consideration. But the difference between that and the Act of 1571 is this. If there is a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good, but if any mark of fraud, collusion or intent to deceive subsequent creditors appears, that will make it void. Otherwise not, but it will stand, though afterwards he becomes indebted. I know no case under the Act of 1571 where a man indebted at the time makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for benefit of his creditors. On that foundation, I take it, this court has grounded their opinion in the execution of powers when they stop in transitu as it is called and says that it shall not be given away from creditors. Therefore, I am not warranted to do otherwise.

There is a case showing the ground and reason of this at law, and that this is considered as part of the estate of the testator at the time of his death, namely, 2 Roll. Rep. 173. It was an odd case. One hardly knows how it came in question. A man actually indebted and conveying voluntarily always means to be in fraud of creditors, as I take it. Here the testator had a power to appoint the benefit of the covenant, or in the other light this chattel interest in the land, to take effect out of the remainder in tail, generally to any person, or to take it to himself. He appoints it not to himself, but merely voluntarily to a daughter to take effect after his death, as it could not be otherwise. In respect of his creditors it must be considered as part of his estate at the time of his death. He having executed it so as to gain the interest to himself and attempted to pass it at the same time to his daughter, the court will not suffer it, saying he has been guilty of a fraud as to them, being indebted at the time. This is an unfortunate case, but I cannot help it, for I must not lay down a rule which will make the rights of creditors precarious.

I must, therefore, declare that she cannot have any specific lien upon the fund unless any surplus after debts which, I fear, will be nothing. The testator being indebted at the time of making the appointment, it is void as against his creditors,

for whose benefit, whatever arises by that deed out of the estate of William Windham, ought to be considered as part of the general assets of the testator, and if a recovery has not been suffered to make good this interest of this estate, I should think William Windham would be bound to do it, for the heirs of his body would not be bound, if he did not, and left no assets.

CUMBER *v.* WAYNE

[Court of King's Bench (Pratt, C.J., Eyre and Fortescue, JJ.), Easter Term, 1721]

[Reported 1 Stra. 426; 11 Mod. Rep. 342; 93 E.R. 613]

Accord and Satisfaction—Accord without satisfaction—Acceptance of lesser sum in satisfaction of a greater—Reasonableness.

Where a liquidated sum is due from one person to another payment of a smaller amount cannot be relied on as a satisfaction unless there is consideration for the relinquishment of the balance.

Where, therefore, a person who owed £15 pleaded the giving of a note for £5 as a satisfaction it was **held** that the creditor's agreement was not sufficient, but there must appear to the court to be a reasonable satisfaction, which there was not in this case.

Notes. Followed: *Fetil* v. *Sutton* (1804), 1 Smith, K.B. 415. Considered: *Pritchard* v. *Hitchcock* (1843), 6 Man. & G. 151; *Goddard* v. *O'Brien* (1882), 9 Q.B.D. 37; *Re Warren, Weedon* v. *Reading* (1884), 53 L.J.Ch. 1016. Followed: *Foakes* v. *Beer*, [1881–5] All E.R.Rep. 106. Considered: *Bidder* v. *Bridges* (1887), 37 Ch.D. 406; *Underwood* v. *Underwood* [1894] P. 204; *D. & C. Builders, Ltd.* v. *Rees*, [1965] 3 All E.R. 837. Referred to: *Story* v. *Atkins* (1726), 2 Ld. Raym. 1427; *Scott* v. *Surnam* (1742), Willes, 400; *Hardcastle* v. *Howard* (1786), cited in 2 Term Rep. at p. 28; *Heathcote* v. *Crookshanks* (1787), 2 Term. Rep. 24; *Steinman* v. *Magnus* (1809), 11 East, 390; *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Curlewis* v. *Clark* (1849), 3 Exch. 375; *Gaskill* v. *Skene* (1850), 14 Q.B. 664; *R.* v. *Carlisle and Brown* (1854), Dears.C.C. 337; *Cooper* v. *Parker* (1855), 15 C.B. 822; *Pfleger* v. *Browne* (1860), 28 Beav. 391; *Rogers* v. *Hadley* (1863), 2 H. & C. 227; *Ibberson* v. *Neck* (1886), 2 T.L.R. 427; *Midland Motor Showrooms* v. *Newman*, [1929] All E.R.Rep. 521; *Vanbergen* v. *St. Edmund's Properties, Ltd.*, [1933] All E.R.Rep. 488.

As to accord and satisfaction generally, see 8 Halsbury's Laws (3rd Edn.) 206 et seq.; and for cases see 12 Digest (Repl.) 516 et seq.

Cases referred to:

(1) *Lovelace* v. *Cocket* (1608), Hob. 68; Brownl. 47.

(2) *Atkinson* v. *Rosse* (1671), 2 Keb. 804; 84 E.R. 508; 12 Digest (Repl.) 670, *5183.*

(3) *Blythe* v. *Hill* (1676), 1 Mod. Rep. 225; 86 E.R. 844; 7 Digest (Repl.) 233, *710.*

(4) *Brown* v. *Wade* (1671), 2 Keb. 581; 84 E.R. 539; 12 Digest (Repl.) 502, *3763.*

(5) *Pinnel's Case* (1602), 5 Co. Rep. 117 a; 77 E.R. 237; sub nom. *Penny* v. *Core*, Moore, K.B. 677; 12 Digest (Repl.) 516, *3863.*

(6) *Richards and Bartlets Case* (1584), 1 Leon. 19; 74 E.R. 17; 12 Digest (Repl.) 516, *3861.*

(7) *Milward* v. *Ingram* (1675), 2 Mod. Rep. 43; 1 Mod. Rep. 205.

A (8) *Case* v. *Barber* (1681), T.Jo. 158; T. Raym. 450; 84 E.R. 1195; 12 Digest (Repl.) 498, *3736.*

(9) *Boisloe* v. *Baily* (1704), Holt, K.B. 711; 6 Mod. Rep. 221; 87 E.R. 972; sub. nom. *Parsloe* (*Purslow*) v. *Baily*, 1 Salk. 76; 2 Ld. Raym. 1039; 2 Digest (Repl.) 672, *1883.*

B (10) *Hawes* v. *Birch* (1614), 1 Brownl. 71; 123 E.R. 672; 12 Digest (Repl.) 505, *3778.*

Appeal from a decision of the Court of Common Pleas in an action of indebitatus assumpsit for £15.

The defendant pleaded that he gave the plaintiff a promissory note for £5 in satisfaction for the £15 and that the plaintiff received it in satisfaction. The C plaintiff put in an immaterial replication to which the defendant demurred, and judgment was given for the plaintiff.

On error, counsel for the plaintiff argued that the defendant's plea was ill because the note for £5 could not be a satisfaction for £15 and that where one contract was to be pleaded in satisfaction of another, it ought to be a contract of a higher nature: *Lovelace* v. *Cocket* (1) (Hob. 68); *Atkinson* v. *Rosse* (2). One bond could D not be pleaded in satisfaction of another: *Blythe* v. *Hill* (3); *Brown* v. *Wade* (4). Even the actual payment of £5 would not do, because it was a less sum: *Pinnel's Case* (5); *Richards and Bartlets Case* (6). Much less should a note payable at a future day.

Counsel for the defendant argued that the plaintiff's demand consisting only in damages, it was for his benefit to have it reduced to a certainty, and to have the E security for it made negotiable. A stated account might be pleaded in bar of an action of covenant: *Milward* v. *Ingram* (7); 1 ROLL ABR. 122. Formerly, indeed, executory promises were not held a satisfaction, but the contrary had been since adjudged: *Case* v. *Barber* (8); *Parsloe* v. *Baily* (9) (1 Salk. 76).

Cur. adv. vult.

F **PRATT, C.J.**—We are all of opinion that the plea [that the defendant gave the plaintiff a note for £5 in satisfaction] is not good and, therefore, the judgment must be affirmed. As the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agrees to accept, and it is not his agreement alone that is sufficient. It must appear to the court to be a reasonable satisfaction, or at least the contrary must not appear, as it does in this case.

G If £5 be (as is admitted) no satisfaction for £15, why is a simple contract to pay £5 a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction without a bettering of the plaintiff's case, as by shortening the time of payment. Nay, the bettering his case is not sufficient in all instances, for a bond with sureties is better than a single bond, and yet that will not be a satisfaction: *Lovelace* v. *Cocket* (1) (Brownl. 47); *Hawes* v. *Birch* (10); 2 ROLL. ABR. 470. The judgment, therefore, must be affirmed.

PRIMROSE *v.* BROMLEY

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), December 14, 1739]

[Reported 1 Atk. 89; cited 2 Ves. Sen. 102; 26 E.R. 58]

Guarantee—Co-sureties—Death of co-surety—Liability of representatives for sum due under bond.

Bankruptcy—Trustee in bankruptcy—Guarantee—Co-sureties—Covenant by assignees in bankruptcy to account "for such money as they or either of them shall receive"—Death of assignee insolvent—Liability of estate for money received in the bankruptcy.

In the event of the death of a co-surety his representatives are liable to the extent of his assets for what was due from him under his bond.

By deed, A., B., and C., assignees in bankruptcy of X. covenanted "for themselves, their heirs, executors and administrators, to account for such money as they or either of them shall receive, to the commissioners." B. got in large sums of money from X.'s estate and later died insolvent. When creditors were ordered to prove their debts against B.'s estate, A., as X.'s assignee in bankruptcy, claimed as a debt such money as B. had received as joint assignee with A. in X.'s bankruptcy.

Held: the words of the covenant must be so construed as to make the assignees jointly and severally bound, and each was separately answerable for what he had received; the commissioners could, therefore, proceed against the estate of B. for the money which he had received.

Notes. The trustee in bankruptcy now discharges the duties formerly performed by assignees of the bankrupt's estate. A trustee must give security approved by the Board of Trade: see Bankruptcy Rules, 1952, r. 355.

As to contribution between co-sureties, see 14 HALSBURY'S LAWS (3rd Edn.) 492, 493; and for cases see 26 DIGEST (Repl.) 216.

Exceptions to a Master's report.

There was a decree in another cause that all creditors as well those who were parties to the bill as otherwise, should come before the Master to prove their debts against the estate of Mead. Among the rest there apperaed before the Master one Moore, the surviving assignee of one Barker, a bankrupt, who claimed as a debt such money as Mead had received as joint assignee with Moore, under the commission against Barker. In the deed of assignment, Moore, Mead, and another assignee of Barker, covenanted for themselves, their heirs, executors, and administrators, to account for such money as they or either of them shall receive, to the commissioners." Mead, before his death, got in very large sums of money from the bankrupt's estate, and had died insolvent.

The question before the Master was whether the commissioners under this assignment were to be considered as simple contract creditors only. It now came before the court on exceptions to this part of his report.

LORD HARDWICKE, L.C.—I am of opinion that the commissioners ought to be considered as specialty creditors because the assignees executed a counterpart of the assignment to them, and the agreement, being under hand and seal, makes it in the nature of a specialty debt; and, as they are considered in this light, although Mead is dead without any personal assets, yet they may come on his real estate.

The words of the assignment, "to account for such money as they or either of them shall receive," must be construed so that the assignees may be jointly and severally bound, so that they are to be considered in this court as mere trustees, and each separately answerable only for what they receive. It would be of dangerous consequence to hold them otherwise. There was a case which I determined

in this court, where there were two persons jointly bound in a bond [and] one of the obligors died. To be sure, at law, it might have been put in suit against the survivor, but as I thought it extremely hard, I decreed the representative of the co-obligor should be charged pari passu with the surviving obligor in the payment of the bond.

Although the form in the assignment under this commission of bankruptcy is the common and usual one, yet I think it very proper that the words "jointly and severally" should be inserted for the future, for the safety and security of each respective assignee.

RAMSDEN *v.* HYLTON
HYLTON *v.* BISCOE

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), June 17, 1751]

[Reported 2 Ves. Sen. 304; 28 E.R. 196]

Deed—Release—Construction—General release governed by particular recital.

If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words the law will construe it to relate to the particular matter recited which was in the contemplation of the parties and intended to be released.

Equity—Release—Enforcement—Knowledge of rights essential.

A party is not bound by a release unless at the time when making it he was aware of his rights.

So, rights under a settlement which neither party to a release knew of **held** not to be barred by the release.

Notes. As to construction of release, see 8 HALSBURY'S LAWS (3rd Edn.) 218; and for cases see 12 DIGEST (Repl.) 567 et seq.

Cases referred to:

(1) *Faine* v. *Brown* (1750), cited in 2 Ves. Sen. at p. 307; 28 E.R. 198, L.C.; 44 Digest (Repl.) 52, *380.*

(2) *Goring* v. *Nash* (1744), 3 Atk. 186; 26 E.R. 909, L.C.; 40 Digest (Repl.) 570, *756.*

(3) *Vernon* v. *Vernon* (1731), 2 P.Wms. 594; 24 E.R. 875, L.C.; affirmed, 1 Bro. Parl. Cas. 267, H.L.; 40 Digest (Repl.) 530, *399.*

Bills in Chancery.

Henry Hylton, appearing to have been a rather weak man, intended in 1688 to divest himself of his estate, and make a settlement of it on his son John, reserving provisions to himself, his wife and daughters. They reduced this into execution in 1688; by which the estate of the family was conveyed on trust to raise several sums, with a proviso that as soon as John should marry, or pay his sisters those sums, the trustees should convey the estate to John and his heirs. There were still some disputes in the family, but in 1693 John married the daughter of Sir Richard Musgrave, and in 1694 made a settlement of his estate on this recital: That whereas he had married as aforesaid, and whereas Sir Richard Musgrave and Dorothy Madison, his wife's grandmother, in consideration of the said marriage, and the covenants, grants and agreements after mentioned, had paid, agreed, and secured to pay, to John £2,000 for and upon the marriage portion of his said wife, John covenanted to convey this estate by fines or recoveries to certain uses; and covenanted that until the fines were levied he and his heirs should stand seised to

those uses. The uses were to himself for life, remainder as to part to his wife in part of her jointure, remainder to the first, etc., son of the marriage in tail male; and afterwards remainder to trustees for ninety-nine years in default of issue male, on trust that if there was no issue male and two or more daughters of the marriage, to raise £8,000 for their portions to be paid at twenty-one or marriage. He died in 1707, leaving by this marriage six children, two sons, Richard and John, and four daughters, all then very young. His widow died in 1709. Richard came first into possession of the estate, and acted as owner of it, making mortgages, etc. On his death his brother John came into possession, and acted in same manner.

It did not appear that this settlement or articles was discovered or known in the family until after the death of John the son, when it was found among the papers left by the grandmother of these four ladies in the hands of her representatives. But after these sisters came of age, there were transactions between them and their brother John. Mrs. Biscoe, one of the four, coming of age in 1727, an indenture was in 1728 entered into between her and her said brother, which recited that he was indebted to his sister in a bond of £2,000 to secure payment of £1,000 with interest; and made a mortgage of part of the settled estate by way of security for payment of it, with a covenant that he was seised in fee. Then came a clause, that in consideration of that she released to John, his heirs, executors, and administrators, all actions, causes of action, sums, portions, legacies, claims and demands for and by reason of the will of their mother, or of John's having taken administration to his brother Richard, or for his brother's or father's personal estate, or by leases for lives or years of the collieries of his father, or for and by reason of any other matter and thing except the recited bond in this release. John Hylton died without issue male.

Three bills were now brought. The first by creditors; the second by Sir Richard Hylton, devisee of the real estate of the late John Hylton, subject to his debts and encumbrances, to establish the will and have the trusts performed; and a particular part of the relief prayed was against this settlement, which was now discovered, and insisted on by Biscoe and his wife, to have that set aside and delivered up. The third bill by Biscoe and his wife to have the benefit of that settlement in 1694, as far as it related to the trust term of ninety-nine years for raising £8,000 for daughters in default of issue male, a fourth part of which sum was claimed by her, as one of the four daughters of the maker of that settlement, in the event, that happened, of the issue male of her father and brothers having failed; and also to have a satisfaction for two sums, one of £1,000 under the mortgage in 1728, and £1,000 legacy under the will of John Hylton.

Against the performance of the trust of this settlement or articles several objections were made. First, that it was made after marriage, and must, therefore, be considered as voluntary. Although it must be admitted that if a marriage was had, and a settlement afterwards made, although no articles before, and a portion was paid, the portion so advanced, paid, or agreed to be paid at that time, would make it equal to a settlement before marriage and a covenant for valuable consideration: yet this could not be so because of recital of this settlement, which was of a very particular kind; from which it must be inferred that £2,000 was agreed to be paid at the time of the marriage not relative to any settlement to be made; so that the party was entitled to the portion, whether a settlement was made or not, and, therefore, voluntary on his part.

Next, the portion was not paid, or secured to be paid, nor any endorsement on the deed.

Next, it all rested in articles and covenant, therefore ought not under all the circumstances to be carried into execution. It was discretionary in a court of equity whether they would carry articles into execution; which would not be done after a great length of time, nor so far as to incur a great hardship or prejudice to either side; therefore, if there could not be a remedy at law, to which they must be left, there was no ground for equity to interpose, for there is a great difference between the bills to set aside rights or to carry them into execution. There were

A cases where the court would not relieve against a deed, when at the same time they would not upon a bill carry it into execution. On a contract for a release of a house for a coffee-house it was found that a chimney could not be made convenient for a coffee-house. On a bill to compel performance, LORD TALBOT refused it, merely because the tenant would be obliged to take it for that purpose he did not want. In *Faine* v. *Brown* (1) a man was entitled to a small estate under his B father's will, given on condition that if he should sell it in twenty-five years, half the purchase-money should go to the brother. He agreed in writing to sell it, and afterwards refused to carry it into execution, pretending to have been intoxicated with liquor at the time. A bill was brought to compel it. Your Lordship said that without the other circumstance, that hardship alone of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the C court not to interfere, but leave them to law. So in the case of Oriel College on a bill to have the benefit of deducting land-tax, the court relieved as to the future land-tax, but not as to the past. It was inconvenient to have this now trumped up; and several circumstances of weight in these sort of questions concur against an execution, as length of time, etc.

The acts of the family showed that this settlement was waived or laid aside, D and given up. They claimed under a term in remainder after estates tail, which might have been barred by John, who was tenant in tail.

Mrs. Biscoe had released any demand she could have. John thought it reasonable that she should have no further demand on him and his estate: so did she think, and on that released. Then the equity was that she did not at the time know of this demand. The sole ground where a court of equity relieved on the E want of knowledge was where the parties were drawn in to do something they would not do if known: but a reasonable woman must have done what she did, if she had known it. The £1,000 under the mortgage deed in 1728 was intended as a provision by John for his sister, who had then no provision; then it was in part voluntary by him, and she ought not to set up this demand against his estate, and at the same time claim a provision from his bounty, which he would not have F made if he had known this; so that he was under a mistake as well as she.

LORD HARDWICKE, L.C. As to the creditor's bill, the relief is plain, and the directions of course, as to part of the second bill, but the question arises on the relief prayed against the settlement. As to that I am in the first place of opinion clearly that the praying to be relieved against that settlement in a court G of equity is one of the most extraordinary demands ever set up in a court of equity, for whatever becomes of that demand there is no colour to bring a bill here to be relieved against it and to have the settlement delivered up to be cancelled, for there is no fraud or imposition to impeach it. The only question, therefore, that can arise as to that, must arise on the third bill, and whether there are not sufficient circumstances by way of defence to that demand is the true question H and not by way of relief by setting it aside. The second bill, therefore, so far as it seeks that relief, must be dismissed; which brings it to the proper question on the bill by Biscoe whether there is sufficient ground in this court to relieve thereon and to decree the £2,000 and interest, or whether the several objections made are not sufficient to prevent a court of equity from interposing to have it raised.

The settlement by Henry, the grandfather, was to trustees and their heirs, so I that the legal estate was in them, and the effect of that settlement was to create a trust of the estate for his son subject to those encumbrances on it, so that he was the owner in equity. The family was not quite at peace, but the proceedings thereupon are not material. If John, the father, had had the legal estate, the deed in 1694 would have passed it; therefore, it does not rest barely in covenant. It is true he had but an equity, but if he had the legal estate, the covenant to stand seised in the meantime would have had its operation in point of law. There was nothing for the daughters if there was issue male of the marriage. It does not appear that this settlement or articles (however it is called) was known in the

family. I am unwilling to suggest it, but I do not know but there is some reason to suspect that John Hylton knew of it, the words of his will looking like it, but whether or not is not material. It was afterwards discovered in the proper hands to find it in, and Mrs. Biscoe now insists on her share under it, viz., £2,000, to which several objections are made, and, indeed, I have hardly seen so much litigation in a cause on a point of this kind where so little ground appears from it.

As to the first objection, this settlement was made after marriage, but there are many settlements and articles after marriage which have been on good consideration decreed to be performed in this court and after a length of time. It is further said to be voluntary, for though it is rightly admitted that, if a portion is paid, it will make it equal to a settlement before marriage, yet it is said this cannot be so, but the words of the settlement do not import that on which this objection is founded, for it is also in consideration of the covenants, grants, and agreements aftermentioned. If they had agreed before marriage in that manner that would have connected one with the other, and made a good consideration so that it appears a settlement made for consideration agreed on between the parties at that time.

As to the next objection, it is not in every case that, supposing the portion is not paid, the issue of the marriage shall not have the benefit of the uses of the settlement or articles because the issue of the marriage take from both parties, and whether they perform their agreement among themselves may be immaterial to the issue, and several decrees have passed on that foundation, they being purchasers under both, and consequently both are obliged to perform. But there is no occasion to enter into that, for I am satisfied that the portion was paid, and I wonder they have made so much proof of it at this distance of time, and then it appears to be for valuable consideration.

As to its resting in covenant and articles, it is partly so, but it also amounts to a settlement of the equitable estate, he had, by that covenant to stand seised in the meantime. But, supposing it rested in articles, there are several instances of articles on marriage never carried into execution by an actual settlement, yet notwithstanding as against those parties and the family, those articles are decreed to be carried into execution, though not perhaps against purchasers. It often happens that they never call for an actual settlement of those articles: yet are they considered as such, and many decrees are made on that foundation.

As to the length of time, it is no objection in this case at all, for it must not be computed from the date of the articles, which was long ago, but from the event that happened. If these ladies knew of the settlement, they had no right to this demand till failure of issue male, which was but lately. Supposing Richard or John had left issue male, and made all those conveyances and settlements and incurred all those debts, that issue male would have a right to have carried these articles into execution for their benefit, and to have a decree for it, notwithstanding the behaviour of Richard or John, not as against the mortgagees and encumbrancers without notice, but as against volunteers under John, or as his general creditors merely. If then the issue male would unquestionably have this right, there is the same reason the daughters should have the same benefit.

As to the waiver, I do not understand the motion upon which it is argued, for there is no person having a right to waive or give up the benefit of this settlement.

As to their claiming under a term in remainder after estates tail, that is an objection now against raising this money that has happened in several cases, particularly in *Goring* v. *Nash* (2), in which were both these circumstances—a power of revocation in the father, and next the remainder under which Lady Goring's claim was a remainder after an estate tail in her brother, and these objections were made, notwithstanding which I was of opinion that demand must prevail, and she had a decree accordingly. I took notice in that case that the same objection was made in *Vernon* v. *Vernon* (3); for there the party claimed after a remainder in tail, and if the lands had been purchased, and a settlement made during the life of Thomas Vernon, he would be tenant in tail, and might have barred the remainder, but not having done it, nor any act of his importing an intent to do

A it, the House of Lords and LORD KING held it ought to prevail, and I was of that opinion. Besides the estate tail being in the brother, there was a power of revocation in the father, which he might have executed if he thought fit, and never did: and where the tree falls, it must lie; if people will not take the advantage, it cannot be helped.

The strongest and most material objection is the release, but I am of opinion B it would not be construed as a release of this demand either in point of law or in a court of equity. First it is certain that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent such surprise, will construe it to relate to the particular matter recited which was under the contemplation of the parties and intended to be released. The particular point in consideration was not relative C to this estate, but what they could have against him as representative to his mother, brother, or father's personal estate, to which the words are particularly confined. But there is no occasion to rely on the law for this; for it is clear that it would not in a court of equity, it being admitted on all hands, and it must be so taken, that this settlement was unknown to all the parties: nor did the daughters know of this contingent provision, besides which they had no other D provision out of this estate; and all they could be entitled to must arise out of the personal estate of their father or other relations. It is impossible, then, to imply within the general release that which neither party could have under consideration, and which it is admitted neither side knew of; and as this release cannot have its effect to bar this demand, so it cannot be set up against them in a court of equity.

The only remaining consideration is whether Mrs. Biscoe can claim this £2,000 E part of the £8,000 and interest, and also the £1,000 under this deed in 1728; for it is admitted she cannot claim the £1,000 under the will of her brother John, if she has this £2,000. I am a little suspicious that John, when he made that will, had this in view. There is no ground for what is insisted on as a reason why she should not have both. The demands, this was intended a satisfaction for, were any claim out of the estate of the mother, brother, and personal estate of the F father: and there is no ground from hence to say that the release should be opened, and an account to be taken of what these demands were. It does not appear much moved from the bounty of John, but rather the contrary, considering what she was entitled to under the will of her mother out of her assets, etc. To what purpose, then, should I send it to an inquiry, when it is impossible now to take the account of what was due from the brother to his sister at the time of G entering into this deed? John is dead; and it does not appear what of the estate of the father, brother, etc., came into his hands, and how much Mrs. Biscoe was entitled to out of it. The result then is, that they stated and adjusted this as the sum that was due from him at that time; what he gave to his sisters was not by way of bounty, but satisfaction of the sums due to them, for he made the like deeds to the other sisters; so that the saying that a reasonable woman must have H done the same, is making a supposition that concludes neither way, for a reasonable man would not have asked that. If he had been told of this at that time, he would probably have said that he might suffer a recovery, or, if he did not, it was no great matter, let them have it. He never did suffer a recovery.

Consequently, I must make a decree for the raising and paying the £2,000 with interest at 4 per cent. and also for the £1,000 under the deed of 1728: and in a I case of this kind, where the encumbrancers so nearly exhaust the whole, I will decree an immediate sale without waiting for the account. But let it stand over to see if the mortgagees consent to an immediate sale.

GRAVENOR *v.* HALLUM

[Lord Chancellor's Court (Lord Camden, L.C.), March 6, 1767]

[Reported Amb. 643; 27 E.R. 417]

Charity—Charitable bequest—Gift to churchwardens to repair family vaults.

A gift to churchwardens of two parishes for ever to repair the donor's family vaults in those parishes, **held** not to be a charity and so void, the gift being to churchwardens who were not a corporation and not being blended with charitable gifts bequeathed by the will, but being distinct sums to be applied to that particular use.

Notes. Explained: *Hayford* v. *Benlows* (1716), Amb. 581. Distinguished: *Wright* v. *Row* (1779), 1 Bro.C.C. 61. Considered: *Turner* v. *Ogden* (1787), 1 Cox, Eq. Cas. 316. Explained: *Tregonwell* v. *Sydenham*, [1814–23] All E.R.Rep. 321. Considered: *Cooke* v. *Stationer's Co.* (1831), 3 My. & K. 262; *Henchman* v. *A.-G.* (1834), 3 My. & K. 485. Referred to: *Doe d. Chidgey* v. *Harris* (1847), 16 M. & W. 517; *Re Cooper's Trusts* (1853), 33 L.J.Ch. 27, n.; *Lamson* v. *Lamson* (1854), 24 L.J.Ch. 46; *Smith* v. *Lomas* (1864), 4 New Rep. 318.

As to non-charitable purposes, see 4 Halsbury's Laws (3rd Edn.) 232 et seq.; and for cases see 20 Digest (Repl.) 402 et seq.

Case referred to:

(1) *Jackson* v. *Hurlock* (1764), 2 Eden, 263; Amb. 487; 28 E.R. 899, L.C.; 48 Digest (Repl.) 280, *2509*.

Bill by trustees and executors for the directions of the court.

The testator, Robert Goldsbury, by his will dated Jan. 20, 1765, gave to the plaintiffs (whom he made executors) and their heirs his messuage wherein he dwelt, with the appurtenances, in the parish of Saint Clement in Ipswich, but subject to the several annual payments, making together £10, therein after given, and for ever charged thereon, and also all other his real estates, on trust to be by them absolutely sold, as soon as might be after his death for the best price, and the money arising by sale and the rents and profits of the real estate until sale, together with the residue of his personal estate, he willed should be applied, in the first place, in payment of his funeral charges and debts and for reimbursing his trustees and executors their reasonable costs, damages and expenses, and, in the next place, in the payment of his legacies. He gave several legacies, and all the residue of his money arising by sale of the real estate, and by the rents and profits till sold, and of his personal estate after such deductions as aforesaid, he willed should be divided into four parts which he disposed of in manner thereinmentioned.

He then disposed of the £10 a year, namely, two sums of 20s. a year each to the churchwardens of two different parishes, for ever, to be laid out in repairing his family vaults in each of those parishes. The rest was given clearly to charitable uses.

In a bill by the trustees and executors, for the directions of the court two questions were asked: (i) whether the devise of the two sums of 20s. each for repair of the family vaults was void; (ii) whether the charity devises which were clearly void by the Statute of Mortmain [law of mortmain abolished by Charities Act, 1960], and also the two sums of 20s. each, in case they were void, should sink into the estate for the benefit of the residuary legatees or be considered as so much of the real estate undisposed of and go to the heir-at-law.

LORD CAMDEN, L.C.—To the first question, I am of opinion that the whole bequest of £10 was void. The two sums on which the doubt is made are trifling in themselves and are mixed with others that are clearly void. They are given to churchwardens who are not a corporation, to take, and, therefore, are void at law. That being so, a court of equity will not appoint new trustees to set them up. Secondly, they are not blended with the charities but are distinct sums directed to

be applied for that particular use, and although the churchwardens could not take, yet the devise is good and the heir-at-law is a trustee.

To the second question, it is material that the residuary legatees are not so of the land itself but of the money after the land is sold. I am of opinion that the heir-at-law is entitled. The distinction between residuary legatees taking lapsed legacies and residuary devisees not taking lapsed devises of real estate, is settled. The rule as to the real estate is that, where the intention of the testator is to devise the residue exclusive of a part given away, the residuary devisee shall not take that part in any event. If he had said: "I give my estate over and above the rent charge," it would have been more plain. It is the same thing as if he had so expressed himself. The rentcharge is severed for ever from the devise which he gives to the residuary legatees. The estate is to be sold, and the money divided. This distinguishes the case from *Jackson* v. *Hurlock* (1). The charge in that case was by a separate instrument, made no difference from the case of its being in the will itself. I rest my opinion altogether on the intention of the testator and on the strong reluctance in the court to disinherit an heir-at-law.

Ex parte GRIMSTONE

[Lord Chancellor's Court (Lord Apsley, L.C., assisted by Smythe, B., and De Grey, C.J.), May 5, 1772]

[Reported Amb. 706; 4 Bro.C.C. 235, n.; 27 E.R. 458]

Mentally Disordered Person—Management of estate—Benefit of patient—Order affecting estate after death of lunatic.

In the management of a lunatic's estate, the ruling principle is to do what is for the benefit of the lunatic.

The Lord Chancellor may make an order in a lunatic's affairs after the death of the lunatic. Where, therefore, a mortgage was paid off before the lunatic's death, a declaration could be made after his death as to the person in trust for whom the property was held.

Notes. Considered: *Ex parte Bromfield* (1792), 1 Ves. 453. Applied: *Compton* v. *Oxenden* (1793), 2 Ves. 261. Explained: *Oxenden* v. *Compton* (1793), 2 Ves. 69. Considered: *A.-G.* v. *Ailesbury* (1887), 12 App. Cas. 672. Referred to: *Re Sefton* (1898), 78 L.T. 765; *Re Gist*, [1904] 1 Ch. 398.

As to the effect of the death of a mentally disordered person, see 29 Halsbury's Laws (3rd Edn.) 600; and for cases see 33 Digest (Repl.) 636 et seq.

Case referred to:

(1) *Ex parte Roberts* (1743), 3 Atk. 5, L.C.; subsequent proceedings sub nom. *Robert's Case* (1746), 3 Atk. 308; 26 E.R. 979, L.C.; 33 Digest (Repl.) 631, *642*.

Petition by the heirs-at-law of a deceased lunatic.

A commission of lunacy issued against Bridget Grimstone, in 1748; she was found to be a lunatic, and that she was entitled to the equity of redemption of an estate subject to two mortgages for years, the one for £1,000 and the other for £500. The custody of the estate was granted to Elizabeth and Rebecca Bowes, her heirs-at-law, and a receiver was appointed. The mortgages which were paid off in the lifetime of the lunatic out of the savings of the estate were, by order of Lord Northington, L.C., assigned to attend the inheritance. On the death of the lunatic, the next of kin petitioned Lord Apsley, L.C., to have the lunatic's

personal estate and to have the £1,000 and £500 considered as part of the personal estate. The court declared that the trustee to whom the terms were assigned ought to be deemed a trustee for the next of kin of the lunatic to the extent of £1,000 and £500 and interest thereon, and directed an account to be taken accordingly.

The heirs-at-law petitioned for a rehearing of the former petition, which came on before Lord Apsley, L.C., assisted by De Grey, C.J., and Smythe, B. The two judges differed in opinion. Smythe, B., thought the last order right; De Grey, C.J., thought that the benefit of the terms should go to the heirs-at-law.

LORD APSLEY, L.C., now gave his opinion: Two questions are made by the heirs-at-law: first, that Lord Northington's order was right, and secondly, if wrong, yet the Great Seal has no jurisdiction to vary it.

On the second question, both the judges thought that the Great Seal had jurisdiction to vary the first order.

[Having heard argument on the question, His Lordship continued:]

It was said that the authority arises from the King's sign manual and ends with the death of the lunatic; and the bonds of the committee having been given up, the Great Seal cannot enforce the order. It is said in answer that the original of the Crown's having the custody of idiots and lunatics is more matter of curiosity than use.

It certainly existed before the Statute de Prerogativa Regis. The writ does not go of course but must be sued for. After the return to the commission, the Great Seal, by virtue of the King's sign manual, grants the custody merely to save the application to the King in person. After the custody is granted, the Great Seal acts in matters relative to the lunatic, not under the sign manual, but by virtue of its general power as keeper of the King's conscience. It is usual to take bonds from the committee to account and submit to orders, but I do not apprehend it is absolutely necessary. The court makes many orders and enforces them by attachment; which orders and manner of enforcing them are not warranted by the sign manual, but by the general power of the court. There can be no reason why the orders should not be enforced, independently of the bond: see *Ex parte Roberts* (1), where the court compelled Dr. Finney to execute a conveyance after the death of the lunatic, by attachment. This is sufficient to show that the court has exercised jurisdiction after the death of the lunatic.

As to the principal question, whether Lord Northington's order is right. The objection is that it is a general rule not to alter the nature of the lunatic's estate. The answer is that the rule is so, but must be properly understood. In the management of the lunatic's estate, the ruling principle is to do what is for the benefit of the lunatic. To lay it down as a rule that all the savings out of the real estate shall in all cases go to the next of kin is inverting the principle. The court every day orders the savings to be laid out in repairs and in the discharge of encumbrances on the real estate.

The case of an infant differs from that of a lunatic, because he can dispose of personal estate sooner than he can of real; and yet in many cases the court will order money of an infant to be laid out in discharging encumbrances and even in keeping up house and garden, as lately in the case of Lord Shaftsbury.

Vary so much of the order as declares that the trustee to whom the terms were assigned out to be deemed a trustee for the next of kin of the lunatic, to the extent of £1,000 and £500 and interest.

Order accordingly.

NORTHAMPTON CORPORATION *v.* WARD

[COURT OF KING'S BENCH (Lee, C.J., and other judges), Michaelmas Term, 1745]

[Reported 2 Stra. 1238; 1 Wils. 107; 93 E.R. 1155]

Market—Stallage—Right to erect stall—Remedy for wrongful erection.

Erecting a stall in a market without stallage is not of common right, and trespass is the proper remedy for so doing.

Per Curiam: Every person has of common right a liberty of coming into a public market to buy and sell, but he has not of common right a liberty of placing a stall in a public market. He must acquire that by a compensation which is called stallage. Stallage is not properly a toll, which can only be due by grant or prescription, whereas stallage is demandable in the case of a new erected market. The soil is no further considered as dedicated to the public than the common right of entry goes.

Notes. Considered: *London Corpn.* v. *Greenwich Union Assessment Committee* (1883), 48 L.T. 437; *A.-G.* v. *Colchester Corpn.*, [1952] 2 All E.R. 297. Referred to: *Norwich Union* v. *Swann* (1776), 2 Wm. Bl. 1116; *R.* v. *St. Peter of Mancroft, Norwich* (1828), 6 L.J.O.S.M.C. 69; *Newport Corpn.* v. *Saunders* (1832), 3 B. & Ad. 411; *Lockwood* v. *Wood* (1841), 6 Q.B. 31; *Draper* v. *Sperring* (1861), 10 C.B.N.S. 113; *Free Fishers and Dredgers Co. of Whitstable* v. *Gann* (1863), 13 C.B.N.S. 853; *R.* v. *Casswell* (1872), 20 W.R. 624; *Swindon Central Market Co.* v. *Panting* (1872), 27 L.T. 578; *A.-G.* v. *Tynemouth Corpn.* (1900), 17 T.L.R. 77; *Duke of Newcastle* v. *Worksop U.D.C.*, [1900–3] All E.R.Rep. 549; *Brackenborough* v. *Spalding U.D.C.*, [1942] 1 All E.R. 34.

As to stallage, see 25 HALSBURY'S LAWS (3rd Edn.) 397 et seq.; and for cases see 33 DIGEST (Repl.) 471 et seq.

Cases referred to:

(1) *Heddey* v. *Welhouse* (1598), Moore, K.B. 474; 72 E.R. 705; 33 Digest (Repl.) 469, *198.*

(2) *R.* v. *Burdett* (1697), 1 Ld. Raym. 148; 91 E.R. 996; 33 Digest (Repl.) 473, *270.*

(3) *Six Carpenters' Case* (1610), 8 Co. Rep. 146a; 77 E.R. 695; 46 Digest (Repl.) 374, *170.*

Action of Trespass by breaking and entering the plaintiffs' close called the Butcher Row and erecting a stall there.

The defendant pleaded several pleas which went to issue and were found against him. But his third plea was that there was a public market held every Saturday in the locus in quo for selling of butcher's meat; wherefore he entered the market with his meat in order to sell it, and for that purpose erected a stall in the open market for the necessary exposing his meat to sale, and laid his meat on the stall, prout ei bene licuit, quæ est eadem, etc. The plaintiffs replied that they were seised in fee of the close and market and that the defendant, without their licence and of his own wrong, entered and set up the stall. To this there was a frivolous rejoinder and a demurrer.

LEE, C.J., delivered the following judgment of the court: As to the first point, we are all of opinion that though every person has of common right a liberty of coming into a public market for the purpose of buying and selling, yet he has not of common right a liberty of placing a stall there, but he must acquire that by a compensation which is called stallage. In BLUNT'S LAW DICTIONARY, MINSHEU'S, BOYER VERBO ESTALLAGE and SPELMAN'S GLOSSARY stallage is defined to be a satisfaction to the owner of the soil for the liberty of placing a stall on it; and if in erecting one the soil is broken, it is called piccage. And this of stallage is so fixed to the owner of the soil that in *Heddey* v. *Welhouse* (1) it is held to descend to the borough english heir, though the right to hold the market goes to the eldest son.

It is not properly a toll, which can only be due by grant or prescription; whereas stallage is demandable in the case of a new erected market, and the soil is no further considered as dedicated to the public than the common right of entry goes: 2 INST. 220; *R.* v. *Burdett* (2).

As to the second point, we are all of opinion that an action of trespass is the proper remedy for the owner of the soil against one who wrongfully places a stall there, and he could have no other remedy. He could not distrain damage feasant or, if he could, it would not follow that trespass does not lie. He cannot bring debt or assumpsit, for there is no certain duty or implied contract. SPELMAN says that the stallagiator must facere redemptionem cum præposito burgi, secundum quod cum eo convenire poterit. In all cases of exceeding the authority given by law, the party is a trespasser: *Six Carpenters' Case* (3); 2 ROLL. ABR. 561 G. 1. And this is not so properly a non-feasance as a misfeasance. Though a man has a right to go into a church, yet he has no right to erect a pew there without the direction of the ordinary.

They held, therefore, that the plaintiffs had a right to a satisfaction as owners of the soil, and that they had pursued the proper remedy; wherefore judgment was given for the plaintiffs.

Judgment for the plaintiffs.

ROW AND OTHERS *v.* DAWSON AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), November 27, 1749]
[Reported 1 Ves. Sen. 331; cited in 1 De G.M. & G. 774; 27 E.R. 1064]

Chose in Action—Assignment—Equitable assignment—Form—No particular words necessary.

Bankruptcy—Property available for distribution—Equitable assignment of sum due and becoming due to assignor—Sum payable out of Exchequer—Notice to officer of Exchequer—Bankruptcy of assignor—Rights of assignees.

G. borrowed money from T. and C. and gave them a draft on a fund due to him out of the Exchequer in the following words: "Out of the money due to me . . . out of the Exchequer, and what will be due at Michaelmas, pay to T. £400 and to C. £200, value received." The order was immediately lodged with the officer of the Exchequer, but before it was acted upon G. became bankrupt. On a question whether T. and C. or the assignees in bankruptcy of G. had the best title to the money.

Held: no particular words were necessary for the assignment of a chose in action in equity; the draft was a valid equitable assignment for valuable consideration of the fund in the Exchequer, and, notice of it having been given to the officer of the Exchequer, it prevailed against the assignees in the bankruptcy, and T. and C. were entitled to the money.

Notes. Considered: *Priddy* v. *Rose*, [1814–23] All E.R.Rep. 130. Distinguished: *Re Severn, Ex parte Colvile* (1831), 9 L.J.O.S.Ch. 56. Considered: *Best* v. *Argles* (1834), 2 Cr. & M. 394. Applied: *Hutchinson* v. *Heyworth* (1838), 9 Ad. & El. 375. Considered: *Rodick* v. *Gandell* (1852), 1 De G.M. & G. 763; *Addison* v. *Cox* (1872), 8 Ch. App. 76. Referred to: *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Morrell* v. *Wootten* (1852), 16 Beav. 197; *Diplock* v. *Hammond* 1854), 2 Eq. Rep. 738; *Brice* v. *Bannister* (1878), 3 Q.B.D. 569; *Fitzroy* v. *Cave*, [1904–7] All E.R.Rep. 194.

A As to equitable assignments of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 492 et seq.; and for cases see 8 DIGEST (Repl.) 573 et seq.

Case referred to:

(1) *Ryall* v. *Rowles* (1750), ante p. 82; 1 Ves. Sen. 348; 1 Atk. 165; 1 Wils. 260; 9 Bli.N.S. 377; 27 E.R. 1074; 5 Digest (Repl.) 809, *6840*.

B **Bill** by the assignees in bankruptcy of one Gibson praying that a certain sum of money in the hands of Swinburn, the Deputy Controller of the Exchequer, might be paid to them.

Tonson and Conway lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz.: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson C £400, and to Conway £200, value received." The order was immediately lodged with the officer of the Exchequer, Swinburn, but Gibson became bankrupt before the order was acted upon. The question was whether the defendants, Tonson and the executors of Conway, were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs the assignees under the commission were entitled to have the whole sum paid to them, it being insisted for them that D this draft was in nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy in law or equity.

LORD HARDWICKE, L.C.—At first I little doubted about my own jurisdiction: and whether the plaintiffs ought not to have gone into the Exchequer, as being a court of revenue, for this is not a personal credit given to, or demand upon the E officer, but to be paid out of that money issued out of the Exchequer to the officer; and this is on warrant, to be paid out of the revenue of the Crown for public services. But there is something in the present case delivering it from that. The officer admits he has received a sum of money applicable to this demand, which brings it to the old case of a liberate, which a person has under the Great Seal for the payment of money; upon admission that the officer had money in his hands F applicable to the payment, and proof thereof, that would give courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft not to pay generally, but out of his particular fund, which creates no personal demand: therefore, not a draft on personal credit to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the endorser, G without reference to any particular fund. The first case of which kind I remember to have been determined in the King's Bench not to be a bill of exchange, was a draft by an officer on the agent of his regiment to be paid out of his growing subsistence. Then what is it, for it must amount to something? It is an agreement for valuable consideration beforehand to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of ex- H change, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt, and though the law does not admit an assignment of a chose in action, this court does, and any words will do, no particular words being necessary thereto.

In the case of a bond it may be assigned in equity for valuable consideration, and I good although no special form used. Suppose an obligee receives the money on the bond, and there is written on the back of it: "Whereas I have received the principal and interest from such a one, do you the obligor pay the money to him": this is just that case, only it is not a debt arising from specialty: therefore, like an assignment of rent by direction to a tenant or steward to pay so much of a year's rent to a third person. *Ryall* v. *Rowles* (1), now under the consideration of the court, occurred to me. There the assignment of debts, of which [there was] no possession, came in question, but those were debts depending on partnership, and [it is] mentioned there how far the assignment of a bond should be supported against

the assignees under the commission: and it is clear that they have been supported where the bond has been delivered over; but if not, there has been some doubt whether it should be supported on the footing of the clause in the statute of James I [21 Ja. 1, c. 19 (bankrupts), repealed 6 Geo. 4, c. 16]. But this case is clear of that doubt, because this was a debt due to Gibson without any specialty. This draft, which amounts to an assignment, is deposited with the officer Swinburn, and, therefore, it attached immediately upon it: so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment for valuable consideration.

HENKLE *v.* ROYAL EXCHANGE ASSURANCE CO.

[Lord Chancellor's Court (Lord Hardwicke, L.C.), November 4, 1749]

[Reported 1 Ves. Sen. 317; 27 E.R. 1055]

Mistake—Document—Rectification—Mistake in contract—Contrary to intent of parties.

Insurance—Marine insurance—Policy—Rectification—Mistake—Rectification after loss—Need for strong proof.

A court of equity has jurisdiction to relieve in respect of a plain mistake in a contract in writing as well as against fraud in a contract. A mistake in a contract, which is included therein contrary to the intent of the parties, on proper proof will be rectified. In the case of insurance contracts, if the case is so strong as to require it, the court will grant rectification after the loss has happened. But it is a general rule that a plaintiff must come into equity with clean hands, and, if the contract sought to be rectified relates to an illicit subject, the court will not so encourage the action as to give a remedy, notwithstanding the fact that the defendant knew of the illegality. The only exception to this rule is in the case of usurious contracts, where equity suffers a party to the illicit contract to have relief.

Notes. Referred to: *Marquis Townshend* v. *Stangroom*, [1775–1802] All E.R.Rep. 145; *Wharram* v. *Wharram* (1864), 3 Sw. & Tr. 301.

As to rectification of policies of insurance on the ground of mistake, see 22 Halsbury's Laws (3rd Edn.) 217; and for cases see 29 Digest (Repl.) 67 et seq. As to rectification generally, see 26 Halsbury's Laws (3rd Edn.) 914 et seq.; and for cases see 35 Digest (Repl.) 135 et seq.

Cases referred to:

(1) *Motteux* v. *London Assurance Co.* (1739), 1 Atk. 545; 26 E.R. 343, L.C.; 29 Digest (Repl.) 67, *215.*

(2) *Callaway* v. *Ward* (1730), cited in 1 Ves. at p. 318; Sugden's Vendors and Purchasers, 14th ed., p. 175; 27 E.R. 1055, H.L.; 29 Digest (Repl.) 493, *3520.*

Bill to have a policy of insurance rectified.

The plaintiff insured a ship at and from London to Ostend, from thence to Rotterdam, from thence to the Canaries, warranted an Ostend ship: which ship was afterwards taken. The bill was brought to have the policy rectified on the ground that the intention of the parties was mistaken therein, in that the warranty should not have been so general, viz., should take place from Ostend only, not from London.

During the argument it was said that, although courts of law would in the cases of policies by the usage of merchants admit parol evidence, yet not so as to rectify a mistake on parol evidence, as this court would, as by his LORDSHIP in the case of King Street St. Margaret's, and in *Motteux* v. *London Assurance Co.* (1), where the question was whether the ship was to be insured in port, or in the voyage to London, having been lost in port. The evidence here was the deposition of Knox, who transacted on the part of the company, that the plaintiff applied to him to insure the ship, and that he believed that the plaintiff told him she was or had been an English ship, and might say something concerning the manner or intent of making her an Ostend ship, but that his answer was that he would not enter into the matter, but that, if the plaintiff would warrant her to be an Ostend ship, he would insure: and that on these terms and no other the agreement was made. There was the evidence of another person, who varied from Knox, but it was said that the circumstances spoke stronger than any evidence, that the intent was that she should be an Ostend ship at the time of leaving Ostend, she being then in London, and could not be an Ostend ship without going to Ostend; for which proof was read that it was necessary she should be registered.

Such was the imagination of the parties, and it was absurd to suppose that the plaintiff would warrant her to be so, when he knew she was not; although in general, insurances were proper to be tried at law, yet not always so, this court sending to law under particular directions. The plaintiff's equity was that this policy, which at law must stand on its own foundation, was not agreeable to the intent of the parties; and a mistake was a professed head of equity which could not be proved but by the persons contracting: nor could the plaintiff make use of his material evidence at law. That this court would interpose in such cases appeared from *Callaway* v. *Ward* (2), which was a bill against the insurers of the Sun Fire Office; where the plaintiff had the lease of a house insured, and before its expiration entered into an agreement for a new lease: but before execution, though after expiration of the lease, the house was burned. On application for payment, as within the policy, on the foot of this parol agreement, the office denied it, for that at the time of burning it was not the plaintiff's house. LORD KING determined for the plaintiff on the ground of considering that as done which ought to be done: yet that was as little favourable for the interposition of the court as could be, and the House of Lords was of the same opinion.

As to the objection that this was an illegal trade, and, therefore, the plaintiff, party to an illicit contract, was not entitled to recover; that argument could not lie in the mouth of the defendants, who were acquainted with it, and ought to pay the loss. This, though a trading to an enemy's port in time of war, was not an illicit correspondence: *D'Oliphant* v. *South Sea Co.*, and the case of Sir Robert Nightingale, answering that objection. And though the law prohibited the importation of enemy's goods, it prohibited not the carrying the growth of this country, unless provisions to enemies.

LORD HARDWICKE, L.C.—No doubt, but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified. But the plaintiff comes to do this in the harshest case that can happen: of a policy, after the event and loss happened, to vary the contract so as to turn the loss on that insurer, who otherwise, it is admitted, cannot be charged. However, if the case is so strong as to require it, the court ought to do it.

The first question is whether it sufficiently appears to the court that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement. Secondly, supposing it so, whether this is such a case, under the circumstances of it and nature of the trade, as that the court ought to interpose and relieve.

As to the first, it is certain that to come at that there ought to be the strongest

proof possible, for the agreement is twice reduced into writing in the same words, and must have the same construction: and yet the plaintiff seeks, contrary to both these, to vary them; and that in a case where the witnesses on the part of the plaintiff vary from each other. The single deposition upon which it depends is very uncertain, and imports that they relied on the plaintiff's warranty, leaving the manner of making her an Ostend ship to himself. Then as to the circumstances, during the whole voyage she certainly was to be an Ostend ship: and if the intent of the parties was, as the plaintiff says, there should be some proof of that. The witnesses do not say it was necessary that the ship should go to Ostend, but that she should be registered: if she was not an Ostend ship at the sailing from London, she might be taken by an English privateer, because the end of her voyage was an enemy's port; and the Custom House books [are] not conclusive to the captors, who may show that the voyage was to the Canaries, notwithstanding a different entry there. The plaintiff's mistaking the law of Ostend will not be a ground to vary the agreement; for if the other side knew of it, it is nothing to them, nor turns the loss on them: and there is no colour that they knew of it, or even that the plaintiff thought it was so. But in what case on this uncertain proof am I to turn the loss on the defendant? In a case wherein they would have no consideration, as the premium might be recovered against them; for it is laid down that if the ship was never brought within the terms of the insurance, so that the insurer never runs any risk, the premium must be entered in an action by the assuree: in which case the assured never would have brought a bill to rectify, but would have taken it on the foot of the policy.

Another point has been argued, which I will mention, although I shall not go on it in my determination. It is certainly a general rule that a plaintiff must come into equity with clean hands; and several cases at common law and in equity have gone upon this, that if the contract relates to an illicit subject, the court will not so encourage the action as to give a remedy. Therefore, on an action to recover back money taken by way of bribe to a Custom House officer, or on a corrupt agreement, the court says it will not lie as the plaintiff was a party thereto; nor is it any answer that the defendant knew of this illegality, for that answer would serve in all those cases; and, thefore, the court will stand indifferent. But one exception occurs in these cases, and in which equity differs from the common law; for generally the rule is the same, only equity adheres a little stricter to it. That is the case of usury, in which equity suffers the party to the illicit contract to have relief. But that depends on a distinct reason: that whoever brings a bill in the case of usury, must submit to pay principal and interest due, on which the court lays hold and will relieve; with this further reason, that this court considers usurious contracts in somewhat a different light from what the law does: which considers them upon the foot of the statutes: but this court as a fraud and advantage taken on necessitous persons.

To apply this. I am not satisfied with the answer given to the objection of its being illicit, arising from *D'Oliphant* v. *South Sea Co.*, for that was not trading contrary to the law of this country, but contrary to the agreement with the company; which is different from a contract contrary to the general law of this country, whether statute, common, or maritime law. So of Sir Robert Nightingale's case, which was but a plea in the Exchequer, and but the private right of the company; being contrary only to their statutes, not to the general law of the land; for in such cases no remedy could be in law or equity. No determination has been that insurance on enemies' ships during the war is unlawful; it might be going too far to say all trading with enemies is unlawful; for that general doctrine would go a great way, even where only English goods exported, and none of the enemies imported, which may be very beneficial. I do not go on a foundation of that kind; and there have been several insurances of this sort during the war, which a determination upon that point might hurt. To say no remedy could be in law or equity, it must be very clearly so, and not by any strain. As to the case of insurance on wool transported to France, I never doubted, but that was

an unlawful contract; and, therefore, if a case had come before me, when I was Chief Justice, both sides knowing it, and a seisure for that by the Custom House officer, I should have held it an illicit insurance and contract.

But on the first point there is no evidence to vary the contract from the written words: therefore, the bill must be dismissed; but without costs, for it appears to be a loss by a capture not within the intent of the parties.

Bill dismissed.

SIMPSON *v.* HARTOPP

[Court of Common Pleas (Willes, C.J., and other judges), February 6, May 3, November 28, 1744]

[Reported Willes, 512; 125 E.R. 1295]

Distress—Distress for rent—Exemption—Privileged chattels—Implements of trade in actual use.

Implements of trade in actual use are privileged from distress for rent. Such implements, if not in actual use and there is no other sufficient distress on the premises, may be distrained for rent.

A stocking-frame, an apprentice actually weaving a stocking on it at the time when it was distrained, **held** not distrainable for rent, even though there was no other distress on the premises.

Notes. Followed: *Gorton* v. *Falkner* (1792), 4 Term Rep. 565. Applied: *Gilman* v. *Elton* (1821), 3 Brod. & Bing. 75. Considered: *Wood* v. *Clarke* (1831), 1 Cr. & J. 484. Applied: *Fenton* v. *Logan* (1833), 2 L.J.C.P. 102; *Brown* v. *Shevill* (1834), 2 Ad. & El. 138; *Muspratt* v. *Gregory*, [1835–42] All E.R.Rep. 122; *Darby* v. *Harris* (1841), 10 L.J.Q.B. 294; *Gibson* v. *Ireson* (1842), 3 Q.B. 39; *Parsons* v. *Gingell* (1847), 4 C.B. 545; *Morley* v. *Pincombe* (1848), 2 Exch. 101; *Swire* v. *Leach*, [1861–73] All E.R.Rep. 768; *Clarke* v. *Millwall Dock Co.* (1886), 17 Q.B.D. 494; *Edwards* v. *Fox* (1896), 60 J.P.Jo. 404; *Lavell* v. *Richings*, [1906] 1 K.B. 480; *Challoner* v. *Robinson*, [1908] 1 Ch. 49. Referred to: *Adams* v. *Grane* (1833), 1 Cr. & M. 380; *Walmsley* v. *Milne* (1859), 7 C.B.N.S. 115; *Von Knoop* v. *Moss and Jameson* (1891), 7 T.L.R. 500; *Hickman* v. *Potts*, [1939] 3 All E.R. 794.

As to chattels which are privileged from distress, see 12 Halsbury's Laws (3rd Edn.) 100 et seq.; and for cases see 18 Digest (Repl.) 276 et seq.

Cases referred to:

(1) *Vinkinstone* v. *Ebden* (1698), Carth. 357; Holt, K.B. 674; 1 Ld. Raym. 384; 5 Mod. Rep. 359; 12 Mod. Rep. 216; 1 Salk. 248; 90 E.R. 809; 18 Digest (Repl.) 422, *1682*.

(2) *Read* v. *Burley* (1597), Cro. Eliz. 596; 78 E.R. 795; sub nom. *Burley* v. *Read*, Noy, 68; 18 Digest (Repl.) 281, *282*.

(3) *Viscountesse Bindon's Case* (1585), Moore, K.B. 213.

(4) *Webb* v. *Bell* (1670), 1 Sid. 440; 82 E.R. 1205; sub nom. *Welch* v. *Bell*, 1 Sid. 422; sub nom. *Welsh* v. *Bell*, 1 Vent. 36; 18 Digest (Repl.) 287, *349*.

Action of trover tried at the Leicester Assizes, held at Leicester on Aug. 3, 1743, when the court found a special verdict.

The plaintiff, Nathaniel Simpson, declared against the defendant, Chiverton Hartopp, for that on Oct. 20, 1741, he was possessed of a frame for the knitting weaving and making of stockings, value £20, as of his own proper goods, and being so possessed he lost the same. On Aug. 18, 1742, it came into the hands of the

defendant, who knowing the same to be the goods of the plaintiff on Aug. 19 converted it to his own use; damage £30. The defendant pleaded not guilty. The jury found that the plaintiff, on Mar. 27, 1741, was possessed of a frame for knitting weaving and making stockings, value £8, as his own proper goods. On that day he let the frame to John Armstrong at the weekly rent of 9d., and so from week to week as long as they the plaintiff and John Armstrong should please; by virtue of which letting John Armstrong was possessed of the frame at that rent until the time after mentioned, when the frame was seized as a distress for rent by the defendant. John Armstrong was by trade a stocking-weaver, and used the stocking-frame as an instrument of his trade, and continued the use thereof, and his apprentice was using it at the time thereinafter mentioned, when the same was seized by the defendant as a distress for rent. John Armstrong held of the defendant a messuage and tenement in the parish of Woodhouse and county of Leicester by virtue of a lease granted to him by the defendant under the yearly rent of £35 for a term of years not yet expired, and was in the actual possession of the same when the stocking-frame was distrained for rent by the defendant. On Dec. 19, 1751, John Armstrong was indebted to the defendant in £53 for arrears of rent of the said messuage and tenement; and the stocking-frame was then on the said messuage in the possession of John Armstrong, and there were no goods or chattels by law distrainable for rent in the said messuage without the stocking-frame sufficient to satisfy the rent so in arrear at the time when the stocking-frame was seized as a distress for the rent. On Dec. 19 the defendant entered in the messuage and tenement, and then and there seized the stocking-frame on the premises as a distress for the rent so in arrear, as John Armstrong's apprentice was then weaving a stocking on it. The defendant (though often requested) had refused to deliver the stocking-frame to the plaintiff, and continued to detain the same.

The special verdict concluded by submitting the matter to the opinion of the court whether the stocking-frame was by law distrainable for the arrears of rent or not, and, if the court should be of opinion that it was not, they assessed the damages of the plaintiff at £8.

The case was twice argued; on Feb. 6, 1744, and May 31, 1744, by *Prime*, King's Serjeant, and *Serjeant Bootle* for the plaintiff, and by *Skinner* and *Willes*, King's Serjeants, for the defendant.

WILLES, C.J., delivered the following opinion of the court: Upon this special verdict three questions arise. First, whether a stocking-frame has any privilege at all, as being an instrument of trade; or whether it be generally distrainable for rent as other goods are, even though there was sufficient distress besides. Secondly, though it may be so far privileged as not to be distrainable if there be no other goods sufficient, yet whether or not it may not be distrained if there be not sufficient distress besides. Thirdly, though it be distrainable either in the one case or the other when it is not in actual use, yet whether or not it has not a particular privilege by being actually in use at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very case now in question. There are five sorts of things which at common law were not distrainable: (i) Things annexed to the freehold; (ii) Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ; (iii) Cocks or sheaves of corn; (iv) Beasts of the plough and instruments of husbandry; (v) The instruments of a man's trade or possession. The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides. The two last are only exempt sub modo, that is upon a supposition that there is sufficient distress besides. Things annexed to the freehold as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow. Things

sent or delivered to a person exercising a trade, to be carried, wrought or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are. Cocks and sheaves of corn were not distrainable before the Distress for Rent Act, 1689 (which was made in favour of landlords), because they could not be restored again in the same plight and condition that they were before upon a replevin, but must necessarily be damaged by being removed. Beasts of the plough, etc., were not distrainable, in favour of husbandry (which is of so great advantage to the nation), and likewise because a man should not be left quite destitute of getting a living for himself and his family. The same reasons hold in the case of the instruments of a man's trade or profession. But these two last are not privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in Co. LITT. 47 a. b. and many other books which are there cited; and there are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered; for as the stocking-frame in the present case could only be privileged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides. These are the words in Carth. 358 in *Vinkinstone* v. *Ebden* (1): "The very implements of trade may be distrained if no other distress can be taken." Whether or not this stocking-frame's being actually in use at the time of the distress gives any further privilege is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent for these two plain reasons: (i) Because it could not be restored again upon a replevin in the same plight and condition as it was, but must be damnified in removing, for the weaving of the stocking would at least be stopped if not quite spoiled, which is the very reason of the case of corn in cocks, etc.; (ii) While it is in the custody of any person and used by him, it is a breach of the peace to take it. These are two such plain and strong reasons that even if it were quite a new case I should venture to determine it without any authority at all; but I think that there are several cases and authorities which confirm this opinion. It is expressly said in Co. LITT. 47 a. that a horse while a man is riding upon him, or an axe in a man's hand cutting wood, and the like cannot be distrained for rent. In BRACTON and several other old books there is a distinction made between catalla otiosa and things which are in use. It was held in P. 14 Hen. 8, pl. 6, that if a man has two millstones and only one is in use, and the other lies by not used, it may be distrained for rent. In *Read* v. *Burley* (2) it was held that yarn carrying on a man's shoulders to be weighed could not be distrained any more than a net in a man's hand, or a horse on which a man is riding. So in Moore, K.B. at p. 214, *Viscountesse Bindon's Case* (3), it is said that if a man be riding on a horse the horse cannot be distrained, but if he has another horse on which he rides sometimes, this spare horse may be distrained.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case which seems to look the contrary way, which is *Webb* v. *Bell* (4) (1 Sid. 440), where it was held that two horses and the harness fastened to a cart loaded with corn might be distrained for rent. But in the first place I am not clear that this case is law; and besides it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent; and, therefore, a quære is made whether if a man had been on the cart the whole had not been privileged, which is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and on the strength of these authorities, we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises; and, therefore, judgment must be for the plaintiff.

Judgment for plaintiff.

SAVILE *v.* ROBERTS

[Court of King's Bench (Sir John Holt, C.J.), Michaelmas Term, 1698]

[Reported Carth. 416; 1 Ld. Raym. 374; 1 Salk. 13; 3 Salk. 16; 5 Mod. Rep. 394, 405; 12 Mod. Rep. 208; Holt, K.B. 8, 150, 193; 91 E.R. 1147]

Malicious Prosecution—Damage necessary to support action—Damage to reputation, life, limb, liberty, or property.

Per Sir John Holt, C.J.: There are three sorts of damage, any of which would be sufficient ground to support an action for malicious prosecution. First, damage to a man's fame, as if the matter whereof he is accused is scandalous. The second sort of damage which will support such an action is such as is done to the person, as where a man is put in danger to lose his life or limb or liberty. The third sort of damage is damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. That a man in such a case is put to expense is without doubt, which is an injury to his property; and if that injury is done him maliciously it is reasonable that he shall have an action to repair himself.

An action, therefore, **held** to lie for a malicious indictment which put the party to expense though the charge it contained neither scandalised him nor endangered his personal liberty.

Notes. Considered: *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q.B.D. 674; *Wiffen* v. *Bailey*, [1914–15] All E.R.Rep. 967; *Mohamed Amin* v. *Bannerjee*, [1947] L.J.R. 963. Referred to: *Anon.* (1703), 6 Mod. Rep. 25; *Jones* v. *Gwynn* (1714), 10 Mod. Rep. 214; *Chambers* v. *Robinson* (1726), 2 Stra. 691; *Smith* v. *Hickson* (1734), 2 Barn.K.B. 465; *Reynolds* v. *Kennedy* (1748), 1 Wils. 232; *Golding* v. *Crowle* (1751), Say. 1; *Chapman* v. *Pickersgill* (1762), 2 Wils. 145; *Sutton* v. *Johnstone*, [1775–1802] All E.R.Rep. 170; *Purton* v. *Honnor* (1798), 1 Bos. & P. 205; *Purcell* v. *Macnamara* (1808), 9 East, 361; *Sinclair* v. *Eldred* (1811), 4 Taunt. 7; *Byne* v. *Moore* (1813), 5 Taunt. 187; *Cotterell* v. *Jones* (1851), 11 C.B. 713; *Castrique* v. *Behrens* (1861), 3 E. & E. 709; *Dawkins* v. *Paulet* (1869), 18 W.R. 336; *Allen* v. *Flood*, [1898] A.C. 1 (see [1895–9] All E.R.Rep. 52); *Constantine* v. *Imperial London Hotels, Ltd.*, [1944] 2 All E.R. 171; *Berry* v. *British Transport Commission*, [1961] 3 All E.R. 65.

As to necessity for proof of damage in an action for malicious prosecution, see 25 Halsbury's Laws (3rd Edn.) 369; and for cases see 33 Digest (Repl.) 432 et seq.

Cases referred to:

(1) *Henley* v. *Burstal* (1669), T.Raym. 180; sub nom. *Henly* v. *Burstall*, 1 Vent. 23.

(2) *Atwood* v. *Monger* (1653), Sty. 378; 82 E.R. 793; 33 Digest (Repl.) 402, *157*.

(3) *Beauchamps* v. *Croft* (1569), 3 Dyer, 285; Keil. 26; 73 E.R. 639; 32 Digest (Repl.) 125, *1465*.

(4) *Banister* v. *Banister* (1583), cited in 4 Co. Rep. at p. 17a; 76 E.R. 899; 32 Digest (Repl.) 246, *2745*.

(5) *Daw* v. *Swayne* (1669), 2 Keb. 546; 1 Sid. 424; 1 Mod. Rep. 4; 84 E.R. 342; 33 Digest (Repl.) 394, *69*.

(6) *Chamberlain* v. *Prescott* (1659), cited in 1 Ld. Raym. at p. 380; T.Raym. at p. 135.

(7) *Vander Plunken* v. *Griffith* (1591), Cro. Eliz. 236.

(8) *Norris* v. *Palmer* (1675), 2 Mod. Rep. 51; 86 E.R. 935; 33 Digest (Repl.) 395, *73*.

Appeal by the defendant from a decision of the Court of Common Pleas in an action on the case for maliciously causing the plaintiff to be indicted with others for a riot, for that the plaintiff and divers other persons did stop up a way which belonged to the defendant, with posts, fences, and bars, and which the defendant used for carrying his tithes of grain and hay, of which indictment the plaintiff was acquitted. After verdict for the plaintiff a motion was moved in the Common Pleas in Michaelmas Term, 1695, in arrest of judgment, *Serjeant Lutwyche* appearing for the defendant and *Serjeant Wright* for the plaintiff.

The single question was whether, if A. procured B. falsely and maliciously to be indicted of a riot, upon which indictment B. was acquitted, B. might have an action against A. for so falsely and maliciously procuring him to be indicted. After having been argued two or three times at the Bar of the Court of Common Pleas, the judges in Hilary Term, 1696, pronounced their opinions in solemn arguments. NEVILL and POWELL, JJ., held that the action would well lie, but TREBY, C.J., was of opinion against the action. Whereupon judgment was entered for the plaintiff. Upon which error was brought for the defendant in the King's Bench.

It was argued by *Sir Bartholomew Shower* for the defendant and by *R. Raymond* for the plaintiff in Hilary Term, 1697; by *Hall* for the defendant, and *Northey* for the plaintiff, in Easter Term, 1697.

SIR JOHN HOLT, C.J., pronounced the resolution of the court, that the action would well lie; and, therefore, all the court was of opinion that the judgment ought to be affirmed. He said: This point is not primae impressionis, but it has been much unsettled in Westminster Hall, and, therefore, to set it at rest is at this time very necessary.

There are three sorts of damage, any of which would be sufficient ground to support this action. (i) The damage to a man's fame, as if the matter whereof he is accused be scandalous. This was the ground of *Henley* v. *Burstal* (1). But there is no scandal in the crime for which the plaintiff in the present case was indicted. (ii) The second sort of damage which would support such an action is such as is done to the person, as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action, as appears by the Statute de Conspiratoribus (in the printed book said to be made 33 Edw. 1, but in fact it was made (vide RUFFHEAD's preface to the statutes, p. 24) 21 Edw. 1, as COKE observes in 2 INST. 562) where the Parliament describes a conspirator, and the Statute of Westminster the Second (13 Edw. 1, St. 1, c. 12) which gives damages to the party falsely appealed, respectu habito ad imprisonamentum et arrestationem corporis, and also ad infamiam; but these kinds of damages are not ingredients in the present case. (iii) The third sort of damage which will support such an action is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expense is without doubt, which is an injury to his property; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself. Although this doctrine has been questioned lately, it was always received in ancient times: 3 Edw. 3, 10; 3 Ass. pl. 13; 7 Hen. 4, 31 A.; 11 Hen. 7, 25, 26; FITZHERBERT'S NATURA BREVIUM 116; *Atwood* v. *Monger* (2).

It was objected at the Bar against these old cases that they were grounded upon

a conspiracy, which is of an odious nature, and, therefore, sufficient ground for an action by itself. But conspiracy is not the ground of these actions, but the damage done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action, which is as great in the present case as if there had been a conspiracy. FITZHERBERT'S NATURA BREVIUM D. says, that where two cause a man to be indicted, if it be false and malicious, he shall have conspiracy; where one, he shall have case: so that the actions are founded upon one common foundation, but the number of the parties defendants determines it to the one or to the other. Although in the old books such actions are called conspiracies, yet they are nothing in fact but actions on the case. For conspiracy (to speak properly) lies only for procuring a man to be indicted of treason or felony, where life was in danger: FITZHERBERT'S NATURA BREVIUM 116 A. [Note: TREBY, C.J., was of the same opinion in the Common Pleas]. And if such an action be sued against two defendants for procuring a man to be indicted of a smaller offence, though the word conspiraverunt be in the writ, yet if one of them be acquitted, the other may be found guilty: Y.B. 11 Hen. 7, 25. It is otherwise of a proper action of conspiracy, for there if the one be acquitted, no judgment can be given against the other. But conspiracy, though it be not put in execution, is a crime, and is punishable in the leet. But in an action for a conspiracy no villainous judgment shall be given, unless the life was endangered by that conspiracy; and, therefore, where it is brought for a trespass, it is only an action on the case.

It was objected that the opinion of the judges in *Henley* v. *Burstal* (1) was that no action would lie for falsely and maliciously procuring a man to be indicted of a trespass. HOLT, C.J., said that he remembered that they were of such opinion, and denied the case of 7 Hen. 4, 31. But to that he answered, that though he had a great regard to what the judges then said, for the court was then composed of very knowing men, yet that opinion was not judicial, for such matter was not then in question. But in this case if the grand jury had found ignoramus, no action would have lain against Savile for preferring the bill, because Roberts would not have been imprisoned, nor scandalised, nor put to expenses.

Another objection was that such actions would discourage prosecutions and there was no more reason that an action should be maintainable in this case, than where a civil action was sued without cause, for which no action would lie. If a man slandered another by suing of an action in a proper court, no action would lie for it: Y.B. 2 Rich. 3, 9, 10; Keil. 26 (*Beauchamps* v. *Croft* (3)). To that it was answered that there is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to himself; and if a man fancies he has a right, he may sue an action. *Banister* v. *Banister* (4) makes a difference, that if a man calls A. who is heir-at-law to B. a bastard, A. may have an action against the man; but if the man says A. is a bastard, and I am heir to B. no action lies. If then the law will permit a man to make a false claim out of a court of justice, a fortiori when he proceeds to assert his right in a legal course. The common law has made provision to hinder malicious and frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced, if the claim was false; which judgment the court heretofore always gave, and then a writ issued to the coroners, and they affeered them according to the proportion of the vexation: see 8 Co. REP. 39 b.; FITZHERBERT'S NATURA BREVIUM 76 a. But that method became disused, and then to supply it, the statutes gave costs to the defendants. Although this practice of levying of amerciaments be disused, yet the court must judge according to the reason of the law, and not vary their judgments by accidents. But there was no amerciament upon indictments, and the party had no remedy to reimburse himself but by action. If A. sues an action against B. for mere vexation, in some cases upon particular damage B. may have an action; but it is not enough to say that A. sued him falso et malitiose, but he must show the

matter of the grievance specially, so that it may appear to the court to be manifestly vexatious: *Daw* v. *Swayne* (5), where the special cause was the holding to excessive bail. But if a stranger who is not concerned, excites A. to sue an action against B., B. may have an action against the stranger: Fitzherbert's Natura Brevium 98, n. and 2 Inst. 444.

As to *Chamberlain* v. *Prescott* (6), which was cited, Holt, C.J., said that he had a manuscript report of that case of Bridgman, C.J., of the Common Pleas, written with his own hand, where the case is reported to be thus. Chamberlain brought an action on the case against Prescott, in which he declared that the defendant Prescott caused him falso et malitiose to be indicted upon the statute 8 Eliz., c. 2, s. 4, for having caused C. to be arrested at the suit of S. without his consent, of which he was acquitted, etc.; after verdict for the plaintiff it was moved in arrest of judgment in the King's Bench, and judgment was entered for the plaintiff; upon which error was brought in the Exchequer Chamber, and after the Restoration that case had the great debate and the judgment of the King's Bench for maintaining of the action was reversed. Bridgman, C.J., was against all such actions. But it appears by his report that this was not the reason of the reversal of the judgment, but because Chamberlain was indicted for that which was no offence at all; for in fact Prescott arrested C. in his own name and the name of S. for a debt due to them jointly, which was lawful without the consent of S. and if S. did not appear, if it were in a personal action he might be nonsuit, if in a real action, summoned and severed; and, therefore, it was held to be no offence. To the objection that Chamberlain was put to expense, it was answered that, if he had been guilty, he could not have been damaged, for the judgment must have been arrested. In *Vander Plunken* v. *Griffith* (7) this point came in question, and in it the court were divided; but in *Chamberlain* v. *Prescott* (6) it was held clearly to be out of the statute 8 Eliz., c. 2, s. 4; then since the offence for which he was indicted was not any offence, he put himself to unnecessary charges in the defence of himself. For the same reason it is held in Y.B. 9 Edw. 4, 12, that if a man be prosecuted upon an ill indictment, an action will not lie. In 1 Roll. Abr. 112, 2 Vin. Abr. 19, 1 Danv. Abr. 209, pl. 9, the matter of scandal was not such whereof the common law takes notice. And in *Norris* v. *Palmer* (8) there is the same difference taken.

But Holt, C.J., said that although this action will lie, yet it ought not to be favoured, but managed with great caution. For if the indictment be found, the defendant in such action will not be bound to show a probable cause, but the plaintiff will be constrained to show express malice and iniquity in the prosecution. If ignoramus be returned, where the indictment neither contains matter of scandal, nor cause for imprisonment, nor loss of life or limb, no action will lie; but if there is scandal, or loss of liberty, etc., an action will lie. The whole court being of this opinion, the judgment was affirmed.

Judgment affirmed.

WEEKLY *v.* WILDMAN

[Court of Common Pleas (Treby, C.J., Blencowe and Powell, JJ.), Michaelmas Term, 1698]

[Reported 1 Ld. Raym. 405; 91 E.R. 1169]

Commons—Common—Common sans nombre in gross—Validity of grant—Validity of grant over—Reasonableness.

A grant of common sans nombre in gross is good, but the grantee cannot grant it over.

Per Treby, C.J.: These customs ought to appear of themselves to be reasonable, otherwise they will not be good.

Notes. Referred to: *Ackroyd* v. *Smith* [1843-60] All E.R.Rep. 512; *Race* v. *Ward* (1855), 4 E. & B. 702; *Hill* v. *Tupper* (1863), 2 New Rep. 201.

As to creation of rights in common, see 5 Halsbury's Laws (3rd Edn.) 326 et seq.; and for cases see 11 Digest (Repl.) 28 et seq.

Case referred to:

(1) *White* v. *Coleman* (1673), 1 Freem.K.B. 134; 3 Keb. 247; 89 E.R. 98; 11 Digest (Repl.) 16, *176.*

Also referred to in argument:

Napelton (*Prioress*) v. —— (1348), 22 Lib. Ass. fo. 22, pl. 19; 11 Digest (Repl.) 12, *103.*

Boteler v. *Bristow, City of Coventry Case* (1475), Y.B. 15 Edw. 4, fo. 29, pl. 7, fo. 32, pl. 16; 11 Digest (Repl.) 30, *376.*

Cobham v. *White* (1640), 1 Roll. Abr. 398; 11 Digest (Repl.) 9, *60.*

Mellor v. *Spateman* (1669), 1 Saund. 339; 85 E.R. 489; sub nom. *Meller* v. *Staples*, 1 Mod. Rep. 6; sub nom. *Miller* v. *Spateman*, 2 Keb. 527, 550, 570, 11 Digest (Repl.) 11, *96.*

Gateward's Case (1607), 6 Co. Rep. 59 b; 77 E.R. 344; sub nom. *Smith* v. *Gatewood*, Cro. Jac. 152; 11 Digest (Repl.) 32, *410.*

Anon. (1467), Y.B. 7 Edw. 4, fo. 26, pl. 3; 11 Digest (Repl.) 12, *116.*

Action for interfering with the plaintiff's right of common.

The plaintiff declared that he was occupier of a house for ten years in D., and that for the time aforesaid there was a custom within the town of D. that all inhabitants and occupiers of houses within the town ought to have common for all commonable cattle in a fen called Deeping Fen. By reason thereof, the plaintiff ought to have his common, etc., and the defendant had erected an engine by which he cast the water on the fen, more than could be carried off by the drains of the fen, whereby the fen was drowned; so that the plaintiff could not enjoy his common in so full and beneficial a manner as he ought. The defendant demurred.

This case was brought two or three terms before in this court, and then the plaintiff declared on a prescription for all the inhabitants to have common, etc. It was held that a prescription for an inhabitant or occupier was not good, and, therefore, the plaintiff brought this action and declared on a custom.

Serjeant Leving for the defendant.

Wright, King's Serjeant, for the plaintiff.

TREBY, C.J.—It is agreed that this common cannot be good by prescription. The question, then, is if it be better by custom. In ancient times such grants might be as to the inhabitants, etc., which were then allowed good, as the grant of the Isle of Wexham, but such grants would not be good at this day. So in this case a grant of such a common to the inhabitants for encouragement of habitation in the fen country may be supposed, which ought to be adjudged good if there had been constant enjoyment under such grant: see 2 Keb. 68 [sic.]; 3 Keb.

247 [*White* v. *Coleman* (1)], where such common is mentioned to be good by custom. One ought not to presume any Act of Parliament in the case, for such presumption would make all unreasonable customs good, but these customs ought to appear of themselves to be reasonable, otherwise they will not be good. Therefore, here the plaintiff should have suggested some particular reason to make the custom good as for the better peopling of the fens, etc., for no reason appears in this record to maintain the custom, but the plaintiff should have shown it. It is not sufficient to say that it may be reasonable, which might appear in evidence, but it ought to appear to the court. Although a common sans nombre may be granted at this day yet such grantee cannot grant it over.

BLENCOWE, J.—It will be very difficult to maintain this custom. The plaintiff might have declared of a levant and couchant, and a small evidence would have induced the jury to have found it if it had been traversed. Inhabitants may have a custom to have pot water, which is an interest, and not barely an easement.

POWELL, J., denied that, and said that it was only an easement. He agreed that, if any particular reason had been shown to support the custom, it might have been good.

The court inclined against the custom.

ROE d. WILKINSON *v.* TRANMARR AND OTHERS

[COURT OF COMMON PLEAS (Sir John Willes, C.J., and other judges), February 9, June 25, 1756, June 23, 1757, February 3, 1758]

[Reported Willes, 682; 2 Wils. 75; 2 Keny. 239; 125 E.R. 1383]

Document—Construction—Deed—Construction to effectuate intention of parties—Release—Operation as covenant to stand seised.

A deed which is intended and made to operate in one way may be so construed as to permit it to operate in another way if effect cannot be given to the intention of the parties unless the deed operates in that other way.

A., in consideration of natural love and of £100, by deeds of lease and release, granted, released, and confirmed certain premises, after his own death, to his brother B. in tail, remainder to C., the son of another brother of A., in fee; and he covenanted and granted that the premises should after his death, be held by B. and the heirs of his body, or by C. and his heirs, according to the true intent of the deed.

Held: the deed could not operate as a release because it attempted to convey a freehold in futuro, but that it was good as a covenant to stand seised.

Notes. Applied: *Doe d. Dyke* v. *Whittingham* (1811), 4 Taunt. 20. Considered: *Doe d. Lewis* v. *Davies* (1837), 2 M. & W. 503. Applied: *Doe d. Starling* v. *Prince* (1851), 20 L.J.C.P. 233. Considered: *Monypenny* v. *Monypenny* (1859), 3 De G. & J. 572; *Evans* v. *Robins* (1863), 33 L.J.Ex. 68. Referred to: *Roe d. Earl of Berkeley* v. *Archbishop of York*, [1803–13] All E.R.Rep. 248; *Solly* v. *Forbes*, [1814–23] All E.R.Rep. 437; *Squire* v. *Ford* (1851), 20 L.J.Ch. 308; *Davis* v. *Nichols* (1868), 17 W.R. 291; *Ellis* v. *McHenry*, *Ellis* v. *McHenry* (1871), 40 L.J.C.P. 109; *Minchin* v. *Minchin* (1871), 19 W.R. 993; *Savill* v. *Bethell*, [1902] 2 Ch. 523; *Re Johnston Foreign Patents Co.*, *Re Johnston Die Press Co.*, *Re Johnstonia Engraving Co.*, *J.P. Trust* v. *Johnston Foreign Patents Co.*, *Johnston Die Press Co.*, *Johnstonia Engraving Co.*, [1904] 2 Ch. 234.

As to the general rules of the construction of deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 381 et seq. For cases see 17 DIGEST (Repl.) 253 et seq.

Cases referred to:

(1) *Crossing* v. *Scudamore* (1674), 2 Lev. 9; 1 Vent. 137; 83 E.R. 428; sub nom. *Scudamore* v. *Crossing*, 1 Mod. Rep. 175; 17 Digest (Repl.) 296, *1003*.
(2) *Earl of Clanrickard* v. *Sidney* (*Viscount Lisl*) (1615), Hob. 273.
(3) *Osmere* v. *Sheafe* (1694), Carth. 307; 2 Lut. 1205; 90 E.R. 78; sub nom. *Osman* v. *Sheafe*, 3 Lev. 370; 38 Digest (Repl.) 834, *467*.
(4) *Goodtitle* v. *Pettoe* (1733), Kel.W. 107; Fitz.-G. 299; 2 Barn.K.B. 142; 2 Stra. 934; 25 E.R. 516; 38 Digest (Repl.) 866, *783*.
(5) *Coultman* v. *Senhouse* (1678), T.Raym. 105.
(6) *Walker* v. *Hall* (1677), 2 Lev. 213.
(7) *Harrison* v. *Austin* (1687), Carth. 38.
(8) *Baker* v. *Lade* (1691), 3 Lev. 291.
(9) *Atwaters* v. *Birt* (1601), Cro. Eliz. 856; 78 E.R. 1082; 37 Digest (Repl.) 272, *291*.
(10) *Hore* v. *Dix* (1660), 1 Sid. 25; 82 E.R. 948; 38 Digest (Repl.) 865, *757*.
(11) *Samon* v. *Jones* (1690), 2 Vent. 318.

Special Case reserved on the trial of an action of ejectment at the assizes at York.

By deeds of lease and release, dated Nov. 9 and 10, 1733, Thomas Kirkby in consideration of natural love for his brother Christopher Kirkby and of £100 granted, released, and confirmed to Christopher Kirkby certain premises after the death of Thomas Kirkby, to hold to the said Christopher and the heirs of his body, and after their decease to John Wilkinson, the lessor of the plaintiff, eldest son of the grantor's uncle John Wilkinson, his heirs and assigns, and to the only proper use of John Wilkinson the younger, his executors administrators or assigns for ever, he the said John Wilkinson the younger paying to the child or children of the grantor's brother Stephen Kirkby £200, and for want of such children, the estate was to be free from the payment of the sum of £200. The release contained covenants from the grantor that he was seised in fee of the premises in question, and that it should be lawful for Christopher Kirkby or John Wilkinson the younger, after the grantor's death peaceably and quietly to hold, etc., and it was thereby covenanted, granted, and agreed by and between the parties that all fines, recoveries, and other assurances of the premises already levied, suffered, and executed by and between the parties should enure to and for the only use and behoof of Christopher Kirkby and the heirs of his body, and for want of such issue to the proper use and behoof of John Wilkinson the younger his heirs and assigns for ever, according to the true intent and meaning of those presents. At the time of executing the deeds Christopher Kirkby paid £20 part of the consideration in money, and gave his note for the remainder, a receipt being signed by Thomas Kirkby for the whole sum. Thomas Kirkby continued seised of the premises in question until his death in 1744. Christopher Wilkinson died in 1740 without issue. John Wilkinson, the lessor of the plaintiff, had no notice of the deeds of lease and release until a short time before the ejectment was brought.

The case was argued on Feb. 9, 1756, by *Serjeant Willes* for the plaintiff, and *Serjeant Poole* for the defendant; a second time on June 25, 1756, by *Serjeant Hewitt* for the former and *Serjeant Prime* for the latter; and a third time on June 23, 1757, by *Serjeant Hewitt* and *Serjeant Prime*.

Feb. 3, 1758. **SIR JOHN WILLES, C.J.,** delivered the following opinion of the court: It is admitted that this deed will not operate as a release, because it grants a freehold in futuro, which cannot be done [See now 32 HALSBURY'S LAWS (3rd Edn.) pp. 312, 313]. The only question, therefore, is whether, in respect to John Wilkinson, the lessor of the plaintiff, it can operate as a covenant to stand seised. If it can, he ought to recover in this suit; if it cannot, judgment must be for the defendants.

A great many cases were cited in the argument of this cause, and to be sure there are a great number of cases not quite consistent with one another on the question what shall amount to a covenant to stand seised. But as I think that this case rather depends on the general reason of the law and some particular rules that have been laid down in respect to covenants to stand seised, I shall not go through all the cases that have been cited, but shall only mention some few of them as authorities in point for the opinion which I am going to give, and two or three that were cited on the other side, to show that the judgment which we are going to give does not clash with any of them. We are all of opinion that this deed of release may operate as a covenant to stand seised.

First, we found our opinion on the general rules of law in respect of the exposition of deeds which are laid down in many of the books and are collected out of them by SHEPPARD ON COMMON ASSURANCES, pp. 82, 83, in which the author says that benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat, and that verba intentioni, et non e contrà, debent infervire. Therefore, he says that deeds which are intended and made to operate one way may operate another way if the intention of the parties cannot take place, unless they operate a different way from what they were intended. He puts these instances (among others) that a deed intended for a release, if it cannot operate as such, may amount to a grant of a reversion, an attornment, or a surrender, and so e converso. And that, if a man makes a feoffment in fee with a letter of attorney to give livery, and no livery is given, but there is in the same deed a covenant to stand seised to the uses of the feoffment, if this be in such a case where there is a consideration sufficient to raise the uses of the covenant, it will amount to a covenant to stand seised. In *Crossing* v. *Scudamore* (1), which I shall mention more particularly by and by, SIR MATTHEW HALE, C.J., cites the opinion of HOBART, in his report of *Earl of Clanrickard* v. *Sidney* (*Viscount Lisl*) (2) (Hob. at p. 277), and declares himself to be of the same opinion, that the judges ought to be curious and subtle (HOBART used the word astute) to invent reasons and means to make acts effectual according to the just intent of the parties. It is said in *Osman* v. *Sheafe* (3), which I shall have occasion likewise to mention again presently, that the judges in these later times (and I think very rightly) have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it.

These are the general reasons that we go on, and we think that all the particular rules that have been laid down in respect to covenants to stand seised all concur in the present case. I know of no others but these: (i) there must be a deed; (ii) there must be words sufficient to make a covenant; (iii) the grantor or covenantor must be actually seised at the time of the grant; (iv) the intent of the grantor must be plain; (v) there be a proper consideration to raise the use.

As to (i), this is certainly a deed, and, though it cannot operate as a release, it being signed, sealed and delivered by the party does not cease to be a deed. As to (ii) that there are sufficient words to make a covenant I shall show more particularly by and by, but, if there were no other word but the word "grant," that would be sufficient according to all the cases. As to (iii), it is admitted, and so stated in the Case, that the grantor Thomas Kirkby was actually seised at the time of the grant. As to (iv), nothing can be more plain than that the grantor intended that the lessor of the plaintiff should have the estate after the death of Christopher Kirkby without issue. It is said so in express words in three places in the deed. What estate he was to take is not material at present, he being still living. As to (v) here is a plain consideration as to Wilkinson, the lessor of the plaintiff. He is called in the deed eldest son of his uncle John Wilkinson. If it were not so said in the deed, his relation to the grantor might be averred and proved according to *Goodtitle* v. *Petto* (4) (2 Stra. 935) and several cases that are there cited out of SIR EDWARD COKE's reports.

Having mentioned the general reasons and likewise the particular rules on which

we found our opinion, I shall now mention some few cases which I think are authorities in point. I shall not take notice of the ancient cases, because of late the courts of law have gone much further in the determination of this question, and likewise because there are several rules laid down in these ancient cases which are not now adhered to. I will begin with *Crossing* v. *Scudamore* (1); *Coultman* v. *Senhouse* (5); *Walker* v. *Hall* (6); *Harrison* v. *Austin* (7); *Baker* v. *Lade* (8); and *Osman* v. *Sheafe* (3). [His Lordship commented upon these cases.] These are all the authorities that I shall mention for the opinion that I am going to give, and I think that these are sufficient.

Before I give the judgment of the court, I shall take notice of some objections that were made on the part of the defendants, and two or three cases that were cited to support them.

(i) It was objected that the lessor was no party to the deed. But, to be sure, this is no objection. It is not necessary that a person taking under a deed should be a party; remainders are most commonly limited to persons who are not parties, and especially in covenants to stand seised; (ii) that there was no consideration as to Wilkinson: This I have answered already; (iii) that it was intended to be a deed at common law, and, therefore, cannot operate by the Statute of Uses. This is founded on the dictum in Co. Litt. 49:

> "Where a man hath two ways to pass lands, and both be by the common law, and he intendeth to pass them by one of the ways, ut res magis valeat it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and settling it by the statute, there in many cases it is otherwise."

But that rule has not been observed for above a hundred years last past, and most of the cases cited are determined contrary to it. Nor does Sir Edward Coke lay it down as a general rule; he only says that it is so in many cases. Sheppard, in his book on Common Assurances which I have already mentioned, who has verbatim transcribed the words of Sir Edward Coke, puts a case, which I have already mentioned, directly contrary to this rule; (iv) the next objection was that the deed was void, and cannot operate at all. If by this be meant void as such a deed which it was intended to be, all the cases are against the objection. If it were meant a void deed, this, as I have already shown, is not so, it having been duly executed by the grantor; (v) but the main objection, which the cases (of which I shall take notice) were cited to support, was that no estate passed by this deed to Christopher Kirkby out of whose estate the other estates are to arise, and it is admitted that he can take no estate by this deed. To support this objection were cited *Atwaters* v. *Birt* (9); *Hore* v. *Dix* (10); and *Samon* v. *Jones* (11). If this objection had not been so solemnly determined in these cases to be a good one, I own I should have been of another opinion, because in a covenant to stand seised the estate properly arises out of the estate of the grantor, and his intent that it should not (I think) signifies nothing. For though his intent is to be regarded on the question what estate is to pass and to whom, I do not think it is all to be regarded as to the manner of passing it (of which he is supposed to be ignorant). If it were, it would overturn almost all the cases. But I choose, rather than contradict such great authorities, to distinguish the present case from them, and I think it is plainly distinguishable. For in the present case the estate to Wilkinson could not be to arise out of the estate of Christopher Kirkby, first, because he was intended only to have an estate for life or at most an estate-tail, and secondly, because the lessor's estate is not to commence until after the estate granted to Wilkinson.

There is likewise one thing in the present case much stronger than in any of the cases that have been cited on the one side or the other, for here is not only the word "grant," which has been often construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed that the estate shall go to John Wilkinson in such manner as he has granted it.

For these reasons we are all of opinion that this deed will amount to a covenant by the grantor to stand seised to the use of John Wilkinson, and that, therefore, he ought to have the benefit of the verdict, and may enter up judgment upon it.

Order accordingly.

LEE *v.* GANSEL

[COURT OF KING'S BENCH (Lord Mansfield, C.J., Aston, Willes and Ashhurst, JJ.), January 25, 27, 1774]

[Reported 1 Cowp. 1; Lofft, 374; 98 E.R. 935]

Execution—Forcible entry by sheriff—Right to break open outer door or window of house—Breach of door of lodger's room—Seizure of lodger's goods—Position of debtor evading process.

The outer door or window of a house shall not be broken open by a sheriff's officer seeking to levy execution, but this privilege must be confined to the breach of windows and outer doors intended for the security of the house against persons from without endeavouring to break in. Where the officer has entered the house legally, e.g., by the entrance door being open, he may break open the door of a room in the house, e.g., that of a lodger, or a trunk which he finds there, and take possession of goods therein. In any event there is no protection for a debtor in the house who is attempting to evade legal process.

Notes. Considered: *Ratcliffe* v. *Burton* (1802), 3 Bos. & P. 223. Applied: *Lloyd* v. *Sandilands* (1818), 2 Moore, C.P. 207. Considered: *Hodder* v. *Williams*, [1895–9] All E.R.Rep. 1028. Referred to: *Hodgson* v. *Towning* (1837), Will. Woll. & Dar. 53; *Brunswick* v. *Slowman* (1849), 8 C.B. 317; *American Concentrated Must. Corpn.* v. *Hendry* (1893), 62 L.J.Q.B. 388; *Helman* v. *Horsham and Worthing Assessment Committee*, [1949] 1 All E.R. 776.

As to execution under a fi. fa., see 16 HALSBURY'S LAWS (3rd Edn.) 40 et seq. For cases see 21 DIGEST (Repl.) 559 et seq.

Cases referred to:

(1) *R.* v. *Rogers* (1772), 1 Leach, 89, C.C.R.; 15 Digest (Repl.) 1134, *11,396.*

(2) *Ex parte Wilson* (1743), 1 Atk. 152.

(3) *Semayne's Case* (1604), ante p. 62; 5 Co. Rep. 91 a; 77 E.R. 194; sub nom. *Seyman* v. *Gresham*, Cro. Eliz. 908; sub nom. *Semayne* v. *Gresham*, Moore, K.B. 668; Yelv. 29; 21 Digest (Repl.) 566, *614.*

(4) *Parke and Percival* v. *Evans* (1615), Hob. 62; 80 E.R. 211; 21 Digest (Repl.) 567, *630.*

(6) *Waterhouse and Uxor* v. *Saltmarsh* (1619), Hob. 263.

(7) *Astley* v. *Pinder* (1760), unreported.

Rule Nisi to show cause why the defendant, General Gansel, should not be discharged out of the custody of the warden of the Fleet Prison on the ground of his having been illegally arrested.

It was alleged that the officer broke into the apartment of the house where the defendant lodged and which he had rented by the year for the space of twenty-eight years before. The breaking open the door was sworn to on the part of the defendant and denied by the officer, who swore that the door was open, and that, having got his thigh in, a struggle ensued in which, after a time he prevailed, and then arrested the defendant. The entrance of the officer into the house was at the outer door, and was admitted to have been peaceable and legal.

Wallace, *Bearcroft*, *T. Cowper*, and *Buller* showing cause: First, it is necessary upon an application of this kind for the defendant to make out a clear case, and to entitle himself to the discharge he claims beyond all controversy or doubt. Here the evidence is so contradictory as to leave him no case in point of fact, and, if it did, the law is against him. This introduces the second and principal question in the cause, whether this lodging was the dwelling-house of the defendant or not. The cases upon burglary are material to the discussion of this question. In HALE, HISTORIA PLACITORUM CORONAE 556, it is said that

> "If A. hires a chamber in the house of B. for a certain time, wherein he lodgeth, and during the time contracted for it is broke open, this is burglary; and the indictment shall suppose it to be domum mansionalem of A."

But this is contradicted in many cases, particularly in KELYNG, 83, where it is expressly laid down, that

> "As to an inmate who goeth in at the same door as the owner of the house, he is in the nature of a lodger, and if his chamber be broken open, it is burglary; but the indictment must be laid for breaking the dwelling-house of him that let it, and not of the inmate."

In the present case General Gansel is only an inmate, and, therefore, according to the above authority it cannot be said to be his dwelling-house. Again, at the Old Bailey Sessions after Michaelmas Term, 1701, it was held by SIR JOHN HOLT, C.J., that

> "where inmates have separate rooms in a house, if they enter at the same outer door as the owner, the rooms are not the dwelling-house of the inmates, but of the owner."

Consistent with the opinions of these two great men is a decision as late as Michaelmas, 1772 [*R.* v. *Rogers* (1)]. One Rogers was indicted for a burglary in the dwelling-house of Chandler, who rented only a shop and parlour in the house from the owner. The rest of the house was occupied by different inmates, the owner himself inhabiting no part of it. It was objected that the burglary ought to have been laid in the mansionhouse of the owner, each apartment in it being occupied by inmates. But all the judges agreed that it was properly laid, else there would be no security from burglary in such a case: But they likewise held that, if the owner had inhabited any part, it would have been clearly otherwise. These cases by analogy show that the apartment in question cannot be said to be the dwelling-house of General Gansel.

But, thirdly, supposing it were his dwelling-house, though in such a case the bailiff ought not to break open the door, yet, if he does, it will not invalidate the arrest, for there are many cases in which an arrest may be good though the conduct of the officer is not strictly right in point of law. In support of this can be cited BRO. ABR., tit. Execution, pl. 100, tit. TRESP., pl. 390—Y.B. 18 Edw. 4, fo. 4, pl. 19, where the sheriff, upon a fieri facias awarded, broke open the house to take the goods. By LITTLETON and the court: Trespass will lie for breaking the house, but the taking the goods was lawful. Same case, DALTON'S SHERIFF, p. 350. This is an authority in point, and clearly proves that, even if it were the dwelling-house of the defendant, it does not follow that the arrest is illegal. On the whole, therefore, the defendant ought not to be discharged out of custody.

Dunning, *Mansfield*, *Cox*, and *Murphy* in support of the rule: The defendant was the sole proprietor of this apartment. As such, it was equally his "castle" in the legal sense of that word as if he had occupied the whole house, and he is equally entitled to protection in it. For the privilege which the law annexes to every man's house is the privilege of protection, and with that view, and in that sense only, is a man's house said "to be his castle." The defendant had no right to shut the house door, but he had a right to shut his own door, and, if it were broken open, what protection or what safety is there under such circumstances? It is,

A therefore, within the reason of the privilege, though there may be no direct case in point. As to the cases of burglary, it is clear that burglary may be committed in such an apartment. The only doubt is whose dwelling-house it should be called. But upon civil process neither a house nor lodging can be broken open. The term "inmate" cannot be applied to General Gansel. In common acceptation it means "rogue," "vagabond," etc. It is not applicable to a person who hires a distinct B apartment, unconnected with the owner of the house. This is as much a distinct property as the chambers of a college or of an Inn of Court which have all one common entrance or fore-door, yet they are the dwelling-houses of the different persons who inhabit them. By parity of reason, a lodging is the mansion of the person who hires it, and so it is expressly laid down by SIR EDWARD COKE, C.J. (3 INST., fol. 65):

C

> "A chamber or room, be it upper or lower, wherein any person doth inhabit or dwell, is domus mansionalis in law."

If so, the officer had no right to break open this apartment in execution of mesne process.

As to the abuse of the process being no ground for discharging the defendant, it D was answered that in all cases of privilege the party arrested was not left to seek his remedy by action, but the court did that which was the substantial justice of the case and placed the party in the same situation as if there had been no abuse, or irregularity in the process. *Ex parte Wilson* (2) was cited. In that case, Wilson becoming bankrupt, a commission issued, after which he was arrested at the suit of the petitioning creditor, and, being in custody, was charged with another E action at the suit of one Wass. Upon petition to the Lord Chancellor to be discharged out of custody upon both actions, LORD HARDWICKE said:

> "Even at law where there is an irregular arrest, and an advantage is taken of the irregularity to charge the party in custody at the suit of another person, the court of law will discharge him from both."

F He ordered the bankrupt to be discharged accordingly.

Cur. adv. vult.

January 17, 1774. **LORD MANSFIELD, C.J.**, delivered the following opinion of the court: This is an application on the part of General Gansel to be discharged out of custody on the ground that the process issued against him by this court has been abused and that his person has been illegally arrested, for that the officer G broke open the door of his apartment which by law he could not do, and, therefore, the court ought to discharge him and put him in the same condition as before the arrest.

To this charge three defences are set up on the part of the plaintiff in the action and of the officer complained against. The first is that in fact the door was not broken open, but was previously open, and the officer having got part of his body, H that is to say, his thigh, in, after a struggle to get in the rest, in which he prevailed, arrested the defendant. The second, which goes to a denial of the whole ground of the application, is this:

> "That the door which was broken open the officer had a right to break open, due notice having been announced, and a refusal given."

I The third is that, supposing General Gansel founded in his application as to the mode of the arrest being illegal, yet his remedy is by action of trespass for breaking open the door, or by the more summary mode of attachment against the officer, nevertheless, that the supposed trespass upon his person is legal, for that the officer had a right to arrest him.

These are the three defences, and as to the first, there is so great a contrariety of evidence that there must be false swearing. I doubt, therefore, where the truth lies, and, supposing the fact contended for on the part of the plaintiff in the action to be true, I doubt as to the consequence, that is, if an actual breaking open of the

door were illegal, I doubt as to the law, where a door being partly open is shut by the person who is within against the officer who is struggling to get entrance. I doubt both as to the fact and the consequence, and, therefore, lay that entirely out of the case.

The second ground of defence, which makes the next question in the case, is whether this door might be lawfully broken open in execution of mesne process. As to that, the case is this. Mr. Mayo was owner of this house in which General Gansel had at the time in question, and for a long time before, taken the first floor which consisted of two rooms, each of which had a door that opened upon the staircase. He had likewise up two pair of stairs, two rooms, each of which had a door that opened in the same manner. He had the use of the kitchen besides, and he rented these several apartments as a lodger from year to year, though that circumstance makes no difference. Mr. Mayo lived in the house, and, which is the material part of the case, there is but one outer door to the house through which Mr. Mayo enters to go to his apartment and General Gansel to go to his. This is a fact concerning which there is no controversy. General Gansel was up two pair of stairs in his bedchamber, and, as he says, the door was locked and after notice the officers broke it open. Nothing turns upon the notice or mode of breaking. The question is whether by law this door could be broken open. I should first state, however, that the outer door of the house was open, and the officers entered there legally. The question, therefore, turns upon the subsequent breaking open of the bedchamber door.

The books talk of the privilege of a mansionhouse and of the privilege of the door of it which cannot be broken open. The whole question will, therefore, turn upon the extent of that which is called privilege. This rule of privilege, arising from a sound maxim of policy, is no privilege of a debtor properly speaking who absconds from justice in avoidance of legal process, but is annexed to the house and door (to which door I forbear at present to give any particular epithet) for the protection of a man and his family. It is, therefore, by consequence only, that the privilege is a protection to such a person, and not for his own sake. The sound maxim of policy is that a greater evil should be avoided for a less, and that a less should give way to a greater. The outer door, therefore, or window of a man's house, says the law, shall not be broken open by process. This has been long and well understood. The ground of it is that otherwise the consequences would be fatal, for it would leave the family within naked and exposed to thieves and robbers. It is much better, therefore, says the law, that you should wait for another opportunity than do an act of violence which may probably be attended with such dangerous consequences. But as this is a maxim of law in respect of political justice and makes no part of the privilege of a debtor himself, it is to be taken strictly and is not to be extended by any equitable analogous interpretation.

The oldest case to be found in the books that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a case in the YEAR BOOK 18 Edw. 4, fo. 4, pl. 19. There, an action of trespass was brought for breaking the outer door in execution of a fieri facias. The court held that trespass would lie

> "for the officer shall not break open an outer door to execute his process: but when the officer had so got in, he broke open a trunk, and took out the goods that were in it; in respect of which they held that trespass would not lie, for he had a right to break the trunk and take the goods."

I quote this case not to imply that I should perhaps have been of the same opinion myself in a case of the first impression, but to show that the rule of privilege is taken most rigidly. Afterwards, in *Semayne's Case* (3), 5 Co. Rep. at p. 93, Michaelmas, 1604, the same strict doctrine was held, namely, that breaking open the outer door was a trespass, but that taking away the goods was lawful. In YELVERTON, 29, Michaelmas, 1602, which was the same case, POPHAM doubted whether even the outer door was privileged, because it would be a hindrance to justice, but afterwards, in Michaelmas, 1604, 5 Co. Rep. 92 b., 93 a., the whole

court held that the outer door ought not to be broken open, and grounded their opinion upon the single authority of Y.B. 18 Edw. 4, fo. 4, pl. 19, before quoted. You see hence with what rigour the privilege has been construed in the oldest cases.

But no case or dictum has been cited at the Bar, nor, indeed, did there ever exist a case, which intimated a doubt whether an inner door might not be broken open. In *Parke and Percival* v. *Evans* (4) and *Waterhouse and Uxor* v. *Saltmarsh* (6) among other outrageous things the bailiff broke open a chamber door, having entered legally at the outer door, but such breaking was held lawful, the first entrance at the outer door which was open having been legal. Yet the latter was a very harsh case, for they broke in when the man and his wife were in bed and behaved with great violence and outrage. But I lay stress on this to show how strictly the privilege has been understood when the outer door or window is secure, and when the entrance has not been forcible through either of them so as to lay open the house and its inhabitants to insult and violence from without, but on the contrary has been quiet and peaceable.

In addition to these authorities, I recollect a note of a case lately determined, which says that an inner door has no protection at all. It was *Astley* v. *Pinder* (7), and was heard in 1760. There, all the other charges against the bailiffs were answered except breaking the inner door, which was accompanied with such violence that the door fell and the officer with it into the room, but all the court were of opinion that the officers, having lawfully entered at the outer door, might break open the inner to execute the duty of their office.

Besides these cases, and in conformity with the principles upon which they have gone, I shall cite a very sensible and material distinction from a book in my hands, which is FOSTER'S CROWN LAW, tit. Homicide, c. 8, s. 20, which is this.

> "The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant, and perhaps further than in the scale of reason and sound policy they will warrant. But in cases of life we must adhere to rules well known and established. But this rule is not one of those that will admit of any extension. It must, therefore, as I have before hinted, be confined to the breach of windows and of outer doors intended for the security of the house against persons from without endeavouring to break in."

This brings the question to this point, whether this was the outer door to the house of the defendant, for the law, we have seen, does not privilege an inner door. It has been said that this lodging is a house and has an outer door, and it has been likened to the case of chambers in the Inns of Court and in colleges which have each an outer door that opens, like the door in question, upon the common staircase, and which, in cases of burglary, have been held to be the houses of the respective occupiers. The fact is that from the nature of those buildings they are all as several houses, and have separate outer doors which are the extremity of obstruction, because the staircase is no outer door. Again, they are enjoyed as separate property. In Lincoln's Inn they have separate estates of inheritance; in the other Inns they have estates for life, and in colleges as long as they reside. So, if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each, they will be separate houses. The distinction, therefore, can only be between several outer doors and one outer door.

How far SIR MATTHEW HALE meant to carry his opinion in the passage that has been cited it is difficult to say. Where a burglary is committed in the apartments of one who lodges in a house, the circumstance of the owner's living in it, or his occupying only a shop or cellar in which he does not sleep, makes a very material difference to the form of the indictment, for in the latter case the lodger has the outer door entirely to himself, and the burglary in such case must be laid to be in the house of the lodger, but it is otherwise in the former case for there it must be

laid to be in the house of the owner. Notwithstanding the greatness of Sir Matthew Hale's authority, it appears not clearly expressed, or perhaps not fully considered. At all events, we must not determine upon a single and uncertain dictum against the many late and positive cases grounded on the oldest decisions and most established principles.

If there were nothing more to confute the doctrine which has exhausted so much learning and ingenuity in support of it, the absurdity of the proposition would of itself be sufficient. It is that, whereas the greatest house in London has but one outer door, this gentleman having four rooms in one house shall have four distinct outer doors. If any of them could be said to be an outer door, it must be the door of the lower rooms, but the truth is that they are all inner doors. Therefore, we are all most clearly of opinion that by law this door was legally broken open.

With regard to the point of relief if the arrest had been illegal I give no opinion, though I think it would depend upon the behaviour of the party applying. It is possible that a person might come to ask that relief under circumstances of such gross misbehaviour as might induce the court to refuse it. Although the court, where a person is arrested who has been attending its process, will interpose, not only by punishing the officer, but by discharging the prisoner out of custody, yet cases of this sort are always matters of discretion with the court in their particular circumstances. But it is not necessary here to enter into that point, as we are all clearly of opinion that General Gansel was legally arrested, and, therefore, ought not to be discharged.

Rule discharged.

TRAFFORD *v.* BOEHM

[Lord Chancellor's Court (Lord Hardwicke, L.C.), March 7, 1746]

[Reported 3 Atk. 440; 26 E.R. 1054]

Trustee—Breach of trust—Liability—Cestui que trust concurring in, or assenting to, breach.

If a trustee errs in the management of the trust he is liable to make good any loss occasioned thereby, but if the breach of trust was committed with the concurrence of the cestui que trust, or his subsequent assent, the loss must be made good first out of the estate of the cestui que trust.

Equity—Conversion—Money directed to be laid out in land—Agreement by parties interested that recipient should take money as personalty.

A court of equity considers things contracted to be done as actually done, having all the consequences they would have had if formally executed. This gives rise to the equitable doctrine of conversion by which land directed or agreed to be sold is to be regarded as money, and money directed or agreed to be laid out in land is to be regarded as land. If, however, the parties interested agree that the recipient of the money under will or contract shall take the money free of its character as realty, the doctrine will not apply.

Notes. For the power of the court to make a beneficiary, in the circumstances specified by the section, indemnify a trustee for a breach of trust, see the Trustee Act, 1925 (26 Halsbury's Statutes (2nd Edn.) 50), s. 62, as amended by the Married Women (Restraint upon Anticipation) Act, 1949 (ibid., vol. 28, p. 733).

Referred to: *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685; *Moxham* v. *Grant*, [1899] 1 Q.B. 480.

As to breach of trust, see 38 Halsbury's Laws (3rd Edn.) 1040 et seq., and

as to conversion, see ibid., vol. 14, pp. 576–588. For cases see 47 DIGEST (Repl.) 464 et seq.; 20 DIGEST (Repl.) 354 et seq.

Case referred to:

(1) *Edwards* v. *Countess of Warwick* (1723), 2 P.Wms. 171; 24 E.R. 687, L.C.; affirmed sub nom. *Countess of Warwick* v. *Edwards*, 1 Bro. Parl. Cas. 207, H.L.; 20 Digest (Repl.) 301, *431*.

Bill and **Cross-Bill** to enforce the covenants in marriage settlements.

By an indenture dated Nov. 30, 1692, between Clement Boehm, of the first part, Ann Dilke, of the second part, and two trustees, of the third, reciting a marriage intended between Clement and Ann, and that she was seised of lands in Hackney, she, with the privity of Clement, for the better provision for her and her issue by Clement, granted and released the lands to the trustees and their heirs, to the use of Clement and Ann during their lives, and the life of the survivor, remainder to the trustees, to preserve contingent remainders, remainder to the first son of Clement by Ann in tail male, remainder to the second and every other son in tail male, remainder to the daughters in tail general, remainder to the survivor of Clement and Ann in fee. By the same deed Ann assigned £1,200 in money to the trustees to be laid out in purchasing lands in fee simple with the consent of Clement and Ann or the survivor to the same uses as were limited of the lands released by the deed, and a proviso that the trustees, if required, should lay out £600, part of the £1,200 in the purchase of a house, to remain to Clement and Ann, or the survivor. By the same deed Ann assigned to the trustees £2,000 due to her from the chamber of London to be laid out in lands to the same uses. Clement covenanted to leave Ann such part of the personal estates as she should be entitled to by the custom of London, if he was a freeman at his death. There was issue of the marriage the plaintiff's deceased husband, Sigismund Boehm (afterwards called Trafford), the eldest son of Clement and Ann, and several other children.

Upon the marriage of the plaintiff with Sigismund Trafford, her fortune was to be laid out by Henry Heathcote and Charles Boehm, the trustees under the settlement before marriage, in the purchase of lands to be settled to several uses, with an express proviso that until a proper purchase of lands could be found the trustees should by Sigismund's direction or consent invest the trust money in government funds or other good securities. There was a recital in the settlement that Sigismund by virtue of his father's marriage settlement was seised in remainder of the land in Hackney to him and the heirs male of his body and to the reversionary interest in the £600 part of the £1,200 and in £1,855 15s. 9d. produced from the £2,000 stock, and that he covenanted to convey (if he survived his father) the land in Hackney, the £600 and £1,855 15s. 9d. to the trustees for the more effectual raising of so much as with the plaintiff's fortune would purchase lands of £400 a year for particular purposes. Henry Heathcote died, and all the trust money remained in the hands of Charles Boehm. The plaintiff's fortune lying dead and no proper purchase then offering, £8,585 thereof was, by the direction of her father and her husband, invested in the purchase of £7,000 South Sea stock. Three years afterwards, South Sea stock being greatly fallen and the plaintiff's father and husband apprehending a further fall, it was sold by Charles Boehm, the sum of £1,369 5s. being lost by the difference of price in buying and selling the stock.

Clement Boehm, the father of Sigismund, by his will dated July 8, 1725, devised to Sigismund the land in Hackney, and £2,455 15s. 9d., i.e., the £1,855 15s. 9d., and the £600 mentioned above and gave to his son Clement £2,000 and to his other children divers legacies, and the residue of his estate to his sons Charles and Edmund, whom he appointed executors, and declared he had given all his children more than was coming to them by the custom of London, and, therefore, willed that upon payment of every legacy, a full discharge should be given to his executors, and in case of refusal of such discharge, he or she refusing should have no more

of his estate than was due by the custom. The testator died in June, 1734, and the two following receipts were given by Sigismund and Clement.

"Received May 19, 1735, of my brothers Charles Boehm and Edward Boehm, executors to my father deceased, the £2,455 15s. 9d. pursuant to my father's last will, and in full of all claims and demands whatsoever upon my father's estate by virtue of his marriage contract, or otherwise, acknowledging this receipt to be a full release and discharge to his executors. Sigismund Trafford."

"Received Nov. 21, 1734, of my brothers Charles and Edmund Boehm, executors to my father deceased, the full sum of £2,000 pursuant to my father's last will, and accordingly I quit claim for ever to any and all demands whatsoever upon the estate of my father, acknowledging and declaring this to be a full discharge to his executors. Clement Boehm."

The plaintiff's husband died on Feb. 1, 1740, without issue, leaving his brother Clement Boehm his heir-at-law. By his will dated Mar. 4, 1739, Sigismund gave all his real estate to the plaintiff for life without impeachment of waste, and after her death and failure of issue by him and the payment of his debts, to his sister Theodosia Hopfer for life, with remainder to several other persons for life, remainder to his own right heirs; and taking notice of the settlement made on his marriage and that the trustees were to lay out the plaintiff's portion in lands and that he had no issue, he charged the reversion in fee of the lands purchased, or to be purchased with her portion (expectant on the deceases of the testator and the plaintiff, and failure of their issue), with his debts, and after payment thereof, devised the same to his brothers and sisters, in such manner and for such estates as he had before devised his real estate, with remainder to his own right heirs.

Clement Boehm, the brother of Sigismund, died on Sept. 30, 1741, leaving the defendant Clement Trafford, an infant, his only child, and heir-at-law.

LORD HARDWICKE, L.C.—The object of Mrs. Trafford's bill is to have the benefit intended for her from her portion and her husband's covenants in the settlements previous to her marriage. The object of the cross-bill of Charles Boehm, surviving trustee under his brother's marriage settlement, is to have the trusts of that settlement performed and to have all just allowances, and in particular to be discharged of the £1,369 5s. part of the trust money lost by the fall of the South Sea stock, and that the £600 and £1,855 15s. 9d. making together £2,455 15s. 9d. may either be applied to make good the trusts of the settlement of Nov. 30, 1692, made on the marriage of old Clement Boehm or to make good the trusts of his (the plaintiff's) brother Sigismund's settlement as the court shall direct.

Under these covenants, and these trusts, several of the questions arise. One question is upon whom the loss of the £1,369 5s. shall fall, and whether that loss has arisen from a disposition of the trust money according to the terms of the trust. I am of opinion that the loss has not happened from a disposition of the trust money according to the terms of the trust, but that it has been laid out in a different manner from what was intended by the trust, which was that it should be invested, till a purchase of lands could be found, in government funds or other good securities. Neither South Sea stock nor bank stock are considered as a good security, because they depend upon the management of the governors and directors and are subject to losses, for instance, it is in the power of the South Sea company to trade away their whole stock while they keep within the terms of their charter. South Sea annuities and bank annuities are of a different consideration. The directors have nothing to do with the principal and are only to pay the dividends and interest till such time as the government pay off the capital, and it is not in their power to bring any loss upon them, and, therefore, are only and properly good securities. The word "funds" does not alter it, because it must relate to such funds as are a good and undoubted security. There is no doubt that this court will endeavour to deliver a trustee from any mischief that may happen from a misapplication of trust money which brings it to the consideration how this loss is to be made good to the trust estate.

A As to the manner of making it good to the trust estate, it must first come out of the estate of Sigismund Trafford, because it was done either with his concurrence or subsequent assent, for he passed the account with his brother Charles and constantly received the dividends of the South Sea stock. The rule of the court in all cases is that, if a trustee errs in the management of the trust and is guilty of a breach, yet, if he goes out of the trust with the approbation of the cestui B que trust, it must be made good first out of the estate of the person who consented to it. Therefore, Sigismund's estate must be applied in the first place.

The next question, and the principal one in the cause, is as to the sum of £2,455 15s. 9d. arising out of the funds which were part of the portion of old Mr. Clement Boehm's wife, whether it shall be considered as real or personal estate upon the circumstances of the case. It must be admitted that it was to be laid out C in land, and consequently, on the footing of the settlement in 1692, must be taken prima facie as land and go as real estate would have done. The question will be then whether the acts since done are sufficient to bar the entail as it is called, or to discharge the transubstantial real quality given it in the consideration of this court.

It is a transaction of fifty years standing, and it appears too that the money, though vested in trustees, was in the hands of old Mr. Clement Boehm. Sigismund D had an expectation of this money coming to himself, and by his settlement covenants that (if he survives his father) he will assure and make over the £2,455 15s. 9d. to the trustees for the more effectual raising so much as with the plaintiff's fortune would purchase lands of £400 a year. This is not made a part of the fund to be laid out, but a further sum for the purchase of lands for the plaintiff's benefit. On July 8, 1725, old Mr. Clement Boehm executes a will, takes upon him to make E a disposition of his estate among his children, and gives the £2,455 15s. 9d. to Sigismund Trafford. After his death the children accept their legacies, and Sigimund and Clement sign receipts and discharges to the executors of old Mr. Clement Boehm. The other sons give discharges for their legacies likewise.

Upon this it has been contended on the part of the plaintiff, Mrs. Trafford, that it is not now to be considered as a debt and subject to be laid out for the benefit F of the remaindermen in tail under the deed of 1692, because Sigismund Trafford, the first tenant in tail, took the money with the consent of his other brothers, and, therefore, is discharged from the entail. Two objections have been made on the part of the defendant Clement Trafford, the son and only child of Clement Boehm the younger, and, consequently, if a remainder exists in this money, he is entitled to it. The first objection was that these acts were done by the parties subsequent G to the settlement in 1692 and are not sufficient to show the intention of the parties that the entail of this money should be barred. The second objection, is that, if sufficient to show the intention, yet they cannot be a bar without a decree of this court. I am of opinion that the acts done by the parties are sufficient to show it was their intention, particularly that of Clement the father, to bar that analogy to the real or that entailed quality in the money. Old Clement gives this H very sum to Sigismund, and apprehended that he was disposing of his own estate. Unless he has given him this, he has given nothing to Sigismund. Then follows the clause in the will, relating to the releases. It has been objected that this is to be confined to the disposition of his personal estate according to the custom of London. But it ought not to be narrowed in this manner, for he intended clearly to bar his children of all the claims to every part of his estate by the legacies given to I them. What is done subsequently? A payment is made by the executors to Mr. Sigismund Trafford of the £2,455 15s. 9d. in satisfaction of all the claims he might have under the marriage settlement, and he has given a receipt in full of all claims, and all the children with notice of their father's will do the same. Therefore, I am of opinion that it was the intention of the parties that Sigismund Trafford should have this money as his absolute property, taking in the circumstances arising from the consent of the remainderman.

The next question is whether the acts done have discharged this money from the transubstantiated real quality, which the high power of this court gives to money.

What governs the court in this respect is that they consider things contracted to be done, as actually done and let them have all the consequences as if formally executed. Therefore, if there be an agreement to purchase land, the court looks on it as done. But if the parties interested have agreed that the money shall not have this quality, that is, to be entailed, it discharges it of the entail. If a man is entitled to have money to be laid out in land to be settled to the use of him and his heirs, there he shall be entitled to the money in this court, and if the party in his lifetime shows any intent to have it in money and dies, then the court will give it to his executor, and not to the heir. If money is directed to be laid out in land, and limited to A. in tail, remainder to B. in tail, remainder to C. in tail, the court will direct it to be laid out in land, if nothing has been done to bar the remainder. But if a person is tenant in tail, reversion in fee to himself, the court will give him the money, because by a common conveyance he may bar the entail and reversion, and, therefore, the court will not put him to the circuity of having recourse to a legal bar.

In *Edwards* v. *Countess of Warwick* (1) Lord Macclesfield laid down the rule of the court in these cases. The limitations here were to Sigismund Trafford Boehm in tail, remainder to his brothers in tail, remainder in fee to himself. This money has been paid to him with the consent of his brothers. Was there then any entailable quality remaining in this money? Suppose a bill had been brought by Sigismund Trafford Boehm to have the money paid to him instead of being laid out in land, and his brothers had by their answers submitted this money should be paid to Sigismund, could the issue of the brothers have insisted it should be laid out in land? Most clearly not, for their issue are equally barred, as if the brothers had received a part of the money themselves.

It was objected that there is no instance of this being done without a decree of the court for that purpose. It is the first time I have heard it laid down that the decree of this court is necessary, and that the parties must come here to have the sanction of the court. Indeed, if the tenant in tail, or remainder in tail, had been a feme covert, she must have come here that the court might have asked her the question whether it was with her consent that the money was to be paid instead of being laid out in land as in the case of a fine. It was said there is no precedent, and, indeed, I cannot say that I have known this court decree acts of this kind to be good, but I will make a precedent.

Bills are generally brought in cases of this nature for the satisfaction and security of trustees. The court pursues the rights of parties, and whatever a court of common law does by a judgment or this court by a decree, is in affirmance of the rights of parties, and does not give them a right which they had not before. Why do the court decree the money? Because the person was entitled to it, and the court being of opinion the parties have the right is the ground on which the decree is made. But where the money is in the hands of a tenant in tail with remainder in fee in himself, if he was to bring a bill to have a declaration of the rights of the parties, it would be dismissed, for this court does not make a declaration of the rights of parties, but decrees upon the rights of the parties as they appear in themselves. I mention this to show that all the court does is in consequence of an antecedent right of the parties, and there is no occasion for a decree in this court unless there is an incapacity of the person, as I said before in the case of a feme covert. It has been said that the money still retains the real quality, and, therefore, must be laid out in land. Sigismund Trafford Boehm, showing his election to have it in money, destroys that transubstantiated real quality, for he has accepted it as money under the will, given a discharge for it to the executors, and by a subsequent settlement in 1725 has taken upon him to make a security of it as money. I am of opinion, therefore, that this sum is not liable to any entail or to be laid out in land or considered as a debt upon the estate of Sigismund Trafford Boehm.

The next question is as to the limitation of Sigismund Trafford's estate under his will, whether the limitation to his sister on failure of issue by him be a good limi-

tation. I had a good deal of doubt with myself in this point, but there is a plain reference to the deed of settlement executed before, and that shows he intended to give this as a reversion after the limitation of his settlement was determined. But suppose there had been no reference. If a man limits £10,000 on failure of issue of the body of husband and wife to any other person in tail, the remainder would have been void as an executory devise, being too remote, as it is upon a dying without issue generally of the husband and wife, but here, as was justly observed in the cause, all the limitations by Sigismund are for life, therefore it is a reasonable construction to confine it to a failure of issue during the lives in being, which has been held in the case of executory devises to be a reasonable construction if it falls within the compass of ever so many lives in being at the same time.

[HIS LORDSHIP decreed, therefore, the limitation under the will of Sigismund to his sister Theodosia Hopfer, one of the defendants in the cause, to be a good limitation. As to the seven acres of land in Hackney, the estate of old Mr. Clement Boehm's wife before her marriage and limited to several persons under the deed of 1692, HIS LORDSHIP was of opinion that no consent or agreement of the remaindermen, where there was a feme covert, unless there had been a fine, could bar the entail, nor was it in the power of a court of equity to carry such an agreement into execution, as to a legal estate, and, therefore, must take its course according to the legal intent, and go to the person who was entitled at law.]

ELLISON *v.* AIREY

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), July 13, 1748]

[Reported 1 Ves. Sen. 111; 27 E.R. 924]

Will—Children—Child en ventre sa mère—Inclusion as beneficiary—Construction of will.

Per LORD HARDWICKE, L.C.: The court will not construe a will to extend to persons not in being unless the testator shows his intention to be such by words in the will.

Will—Children—Gift to younger children of F. on E. dying unmarried and under twenty-one—Children in esse at death of E.

The testatrix in her will gave to E. £300 to be paid to her on attaining the age of twenty-one or on marriage. If E. died before twenty-one or marriage the £300 was to go to the younger children of F. E. died unmarried and under twenty-one.

Held: the legacy was contingent, and there was no reason to confine it to children in esse at the time of the making of the will or at that of the death of the testatrix, for neither was the time at which the legacy was to vest; on the construction of the will the younger children meant were those in esse at the death of Elizabeth before twenty-one or marriage.

Notes. Applied: *Baldwin* v. *Karver* (1775), 1 Cowp. 309; *Congreve* v. *Congreve* (1781), 1 Bro.C.C. 530; *Pierson* v. *Garnet* (1786), 2 Bro.C.C. 38; *Ayton* v. *Ayton* (1787), 1 Cox, Eq. Cas. 327; *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324. Considered: *Hill* v. *Chapman* (1791), 3 Bro.C.C. 391. Referred to: *Leake* v. *Robinson*, [1814–23] All E.R.Rep. 363; *Stone* v. *Harrison* (1846), 2 Coll. 715; *Re Bleckly, Bleckly* v. *Bleckly*, [1951] 1 All E.R. 628, 1064; *Re Wernher's Settlement Trusts*, [1961] 1 All E.R. 184.

As to persons entitled to take under a will, see 39 HALSBURY'S LAWS (3rd Edn.) 1032 et seq. For cases see 48 DIGEST (Repl.) 66 et seq.

Cases referred to:

(1) *Cook* v. *Cook* (1706), 2 Vern. 545; 49 Digest (Repl.) 747, *7009*.
(2) *Web* v. *Web* (1735), unreported.
(3) *Hale* v. *Hale* (1732–3), unreported.
(4) *Heath* v. *Heath* (1740), unreported.
(5) *Northey* v. *Strange* (1716), 1 P.Wms. 346; 24 E.R. 416; 49 Digest (Repl.) 742, *6941*.
(6) *Wild's Case* (1599), 6 Co. Rep. 16 b; 77 E.R. 277; sub nom. *Richardson* v. *Yardley*, Moore, K.B. 397; sub nom. *Anon.*, Gouldsb. 139; 49 Digest (Repl.) 945, *8893*.

Bill to construe and enforce the provisions of a will.

The testatrix devised to the son and two daughters of her nephew, Francis Ellison, £10 apiece by name. Then she devised £300 to Elizabeth Paxton, to be paid to her on attaining the age of twenty-one or on marriage, with the interest in the meantime for her maintenance and education, but, if she died before twenty-one or marriage, then to the younger children of her nephew Francis Ellison, equally to be divided to and among them, the said eldest son being excluded from any part thereof. Some of the younger children of Francis Ellison were born before, some after the making of the will, and some after the death of the testatrix.

It was contended that the provision in the will should take in all the younger children, for it was not to vest at the death of the testatrix, who, therefore, could have no view to that. It is said, excluding the eldest, but who will be eldest, cannot be known till the death of their father. The testatrix knew the eldest was otherwise provided for, and, therefore, gives him nothing, which is making a provision upon the same motives as in a marriage settlement in which "younger children" always mean "all younger children" which shall be born. Had the testatrix intended to have excepted any others, she would have excluded them as well as the eldest. When she intends those already born to have any particular benefit, she names them, and by her not naming them in this clause, but giving by another description, she could not intend it particularly for them. Wherever there is a provision for younger children, all are meant, and on that foundation a posthumous child shall take. The reason of that determination is that it is a younger child no matter when born.

For a child born after the date of the will, but before the death of testatrix, it was argued that the testatrix intended all younger children capable of taking at the time the will took effect. The will does not speak till the death of the testatrix, at which time this child falls within the description. *Cook* v. *Cook* (1) is a case in point—that a child born after the making of the will and before the testator's death should take. Children afterwards born should not take. In *Cook* v. *Cook* (1) there was a devise of personal estate to a man and his children. A child born after the testator's death shall not take, because it vested on his death, and shall not be divested. In *Web* v. *Web* (2), Hil. 1735, there was a devise of the residue of personal estate to the testator's brother H. and all his children, to be divided among them share and share alike: H. had several children, the testator died; and six months afterwards another child was born. Lord Talbot held that this child could not take, which case was stronger than the present, there being the word "all." In *Hale* v. *Hale* (3) there was a devise of £2,000 to "all the children of my nephew J. Hale who shall be living at the death of Amy," and afterwards a devise of the moiety of the residue of the personal estate to all the children of J. Hale, payable at twenty-one or marriage. The question was whether children born after the death of the testator could take. The court was of opinion that as to the £2,000 they should, if born before the death of Amy, upon the particular words of the will, but as to the residue, those only who were living at the death of the testatrix should take. In *Heath* v. *Heath* (4), Feb. 11, 1740, before Parker, C.B., sitting for the Lord Chancellor, there was a devise of copyhold to trustees, to sell for payment of debts and of the rest of the money and personal estate among all

A the children of her brother and sister Heath, respectively, male as well as female, in equal proportions. They had only four children at the time of making the will, and after the death of the testatrix another was born. The court was of opinion that the child born afterwards could not take. The present case differs from those of marriage settlements, for then there are no children, and, consequently, there must be something future to answer the description, and from the nature of the B contract, the same motive going through and the same persons in contemplation, it must include all.

For the defendants who were born before the making the will was further cited *Northey* v. *Strange* (5) (1 P.Wms. at p. 342) that a devise to children and grandchildren should refer to such only as were born at the time of making the will, and the difference taken in *Wild's Case* (6), that a devise to one and his children, if C the children are not in esse, shall be taken as words of limitation, which goes on this foundation, that children not in esse should not take unless devised by words that relate to futurity. The general rule of law is that the person to whom the gift is made must be in esse, unless an intention appears to the contrary. There is no necessity for presuming such intention here, for there were persons in esse to satisfy the words of the will, which words are the same thing as if the children D were particularly named, for a description is sufficient. There is nothing here to show an intention to take in future persons or to take this out of the rules of law which were formerly so strict as not to allow a posthumous child to take at all. The words "younger children" are only an exclusion of the eldest, and are, therefore, mentioned here, and not in the other clause where he was included. Besides, it is common in wills to make use of different words for the same thing. Although E the will has its operation from the death of the testatrix, yet the intention shall be collected from the circumstances at the time of making the will, and here the testatrix is to be presumed to have an affection for the children in esse at the time of giving them this legacy, which is intended as a provision for them and cannot be if this construction prevails, for then there must be an impossibility of payment to any one of them till the death of the father for not till then would it be known F who were to take. By extending this to the children born after making of the will, or death of the testatrix, it will be more probable that the father for whom no bounty was intended might possess part of this legacy as representative to one of his children who lived but one month.

LORD HARDWICKE, L.C.—No certain rule can be laid down in cases of this G kind. They must be various, as very few words will vary the evidence of the testator's intention, and, consequently, the meaning of the will, but there are general principles, which are these.

The court generally takes it that there ought to be a legatee in being, and, therefore, will not construe a will to extend to persons not in being unless the testator shows his intention to be such by words in the will, which is the rule at H common law as to contingent devises and remainders, for they never construe them contingent or executory unless compelled, nor will they adjudge lands to go to an infant en ventre sa mère unless appearing to be so intended from the words of the will, always avoiding it unless there is a clear intention to the contrary. This is to avoid suspending, which always tends to make property uncertain and to the inconvenience of making more divisions than the testator meant. Therefore, when I there is a devise to children, if it was to be suspended till the death of the father, it might be little beneficial to any of them, and where they are made tenants in common, and consequently no survivorship between them, the court would avoid its going over upon the death of any of the children to the father for whom the bounty was not intended. Although this cannot be avoided in some cases, yet extending it further, by allowing it to go to children after born, would make it more probable that the father might take as representing some of his children.

These are the general reasons which the court has gone upon, and I do not know but several of the resolutions on this head might be contrary to the real intention

of the testator, and that for the sake of convenience. There is a great difference between such devises as this and provisions by marriage settlement, for as before marriage there are no children to whom it can be applied, it must mean all, and there is no place to draw the line in nor any reason why it should be for one more than another. It is a parental provision made as a debt of nature, and, therefore, all are entitled. These are the general rules, but this is a middle case, depending on the particular penning of the bequest. It is said that the word "younger" must be restrained to the time of making the will. Others say to the death of the testatrix; others to the death of Elizabeth under age and before marriage; and others that it should go to all younger children. To confine it to the time of making, it is said that the testatrix had taken notice of, and given by name to, the children then in esse who are, therefore, to be considered as the objects of her bounty, but I think it rather holds the contrary way, for where she intends their particular benefit, she names them and when not, she uses the general words "younger children." As to her intending it to all the younger children, there may be a case of that kind, but it would be liable to all the inconveniences which this court has endeavoured to avoid.

I am of opinion that it means such as should be younger children at the death of Elizabeth before twenty-one or marriage. It is a contingent legacy, and there is no reason to confine it to the time of making the will or the death of the testatrix, for neither was the time at which the legacy was to vest, and, therefore, as the whole is suspended till the death of Elizabeth, there is no inconvenience to wait till then. When is this legacy given? At the death of Elizabeth before twenty-one or marriage. What is to be done with it? It is to be divided equally. When? That is not specified, but the natural way of thinking is that she intended it should be divided when it vested. There is a stronger reason to think she meant so, for she has directed where the interest should go during the life of Elizabeth, but after her death before twenty-one or marriage there is no direction about the interest. That is evidence that she intended it to be actually divided at that time, and, if it be divided, it must be vested. This construction answers the words of the will and the intention, avoids all inconveniences, fixes a proper period, and answers what negatively appears to be the intention of the testatrix by her not applying the interest after that period. It also finds out who is the eldest, viz., such as should be so at the death of Elizabeth before twenty-one or marriage.

Order accordingly.

HEYWARD'S CASE

[Court of Wards (Popham, C.J., Anderson, C.J., and other judges), Easter Term, 1595]

[Reported 2 Co. Rep. 35 a; 2 And. 202; 76 E.R. 489]

Document—Construction—Uncertainty—Grant of property—Election by parties.

Where a grant of property is made by an instrument which may operate in more than one way, e.g., either as a demise or a bargain and sale, the uncertainty may be removed by the election of the parties.

When nothing passes to the grantee before the election, the election ought to be made in the lifetime of the parties and the heir or executor cannot make the election. But when an estate or interest passes immediately by the grant the election may be made by them or by their heirs and executors.

Where a thing passes to the grantee, and the election determines only the manner or degree in which he shall take it, the interest vests immediately, and the party, his heir or executor, may make election when they will.

When election is given to several persons nothing vests before election and the first election made by any one of the parties shall stand. If election be given of two several things he who is the first agent and ought to do the first act shall have the election.

Where the things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before, but it is otherwise when to be performed unica vice.

The feoffee, by his act or wrong, may lose his election, and give it to the feoffor.

A general entry is no determination of an election to take an estate by demise or by bargain and sale. So in the case of a general entry by an executor, devisee of a term.

Notes. Considered: *Pepeys* v. *Crereton* (1714–27) Gilb. Ch. 249; *Dann* v. *Spurrier*, [1803–13] All E.R.Rep. 410. Referred to: *Colt and Glover* v. *Bishop of Coventry and Lichfield* (1616), Hob. 140; *Vaspor* v. *Edwards* (1701), 12 Mod. Rep. 658; *Doe d. Berkeley* v. *Archbishop of York* (1805), 2 Smith, K.B. 166; *Miller* v. *Green* (1831), 8 Bing. 92; *Haigh* v. *Jaggar* (1847), 16 M. & W. 525; *Hogan* v. *Hand* (1861), 14 Moo.P.C.C. 310.

As to election to solve uncertainty in deed, see 11 Halsbury's Laws (3rd Edn.) 416–18. For cases see 17 Digest (Repl.) 367–70.

Cases referred to:

(1) *Bullock* v. *Burdett* (1568), 3 Dyer, 281 a; 1 And. 11; Ben. 148; Moore, K.B. 81; 73 E.R. 630; 38 Digest (Repl.) 834, *462*.

(2) *Fulwood* v. *Ward* (1591), Moore, K.B. 301; 2 And. 1; Poph. 86.

Questions arising on the construction of a deed.

Sir Rowland Heyward, Kt., being seised in fee of the manors of Doddington, alias Ditton, Round Acton, and Wenlock in the county of Salop, and of divers other lands and tenements, whereof part was in demesne, part in lease for years with rents reserved, and part in copyhold, by indenture dated Sept. 2, 1591, in consideration of a certain sum of money paid to him by Richard Warren, Edward Pilsworth, and William Cotton, demised, granted, bargained and sold to the said Warren, Pilsworth, and Cotton, the said manors, lands, tenements, and the reversions and remainders of them, with all rents reserved upon any demise, to have and to hold to them and their assigns, presently after the decease of the said Sir Rowland Heyward, for the term of 17 years, yielding to the heirs of Sir Rowland a red rose at the feast of St. John Baptist. This indenture was acknowledged to be enrolled and afterwards Sir Rowland by another indenture covenanted with Thomas Fanshaw and others to stand seised of the premises to the use of himself and the

heirs of his body, and no attornment was ever made to Warren, Pilsworth, or Cotton. Sir Rowland died seised of the premises, his heir within age, and left a third part to descend to his heir. In the Court of Wards the question was whether Warren and the other lessees should have the demesnes and the rents of the copyholders by the demise, as an interest at the common law, and the rents of the lessees for years by bargain and sale by the Statute of Uses, 1535, without attornment, or whether any attornment by the common law was requisite at all to this future interest, or whether the bargainees should have election to take it by the bargain and sale in toto, or by the demise in toto, notwithstanding their general entry, or whether the interest which passed as an interest at common law should be preferred before the raising of a use. After many arguments and great deliberation, it was resolved by POPHAM, C.J., and ANDERSON, C.J., and the whole Court of Wards:

First, if it should pass as a future interest at the common law, there ought to be attornment of the lessees for years, and the attornment in this case ought to be in the life of Sir Rowland, which is before the interest commences. But if a man makes a lease of a manor to begin at a day to come, the tenants may attorn either before or after the day so as the attornment be in the life of the parties. In the case at Bar, because there was not any attornment of the lessees for years in the life of Sir Rowland Heyward, it was resolved that, if they take this interest as a demise at common law, they should not have the said rents reserved upon the said leases for years. Secondly, that it ought to take effect entirely as a demise at common law, or entirely by bargain and sale by raising a use, and not for part by the common law, and for other part by raising a use, for by that the manor would be dismembered, which would be against the express demise and bargain; for both parties agree that a manor should be wholly demised and bargained, and a manor accepted by the lessee, without any fraction or division thereof. Thirdly, it was resolved that in this case Warren, Pilsworth, and Cotton had election to take it, either by demise at the common law, or by bargain and sale, for, although at the common law, if cestui que use and his feoffees join in a feoffment, grant, or demise generally, it shall by construction of law be the feoffment, grant, or demise of the feoffees, who were owners of the lands, and who pass the estate, by common law, and not by cestui que use, who has nothing but a trust and confidence, and who derives only his authority by the statute of 1 Rich. 3, c. 1, as it is agreed in 21 Hen. 7, and the common law shall be, in such case, by its own construction preferred; yet when a man seised of land in fee, for money demises, grants, bargains, and sells his land for years, he who is owner of the land, by his express grant, gives election to the lessee to take it by the one way or the other, for he has sole power to pass it by demise or bargain. Therefore, the law will not make construction against such express grant, and, namely, in this case, when it will trench to the prejudice of the lessees, for if the law should enforce them to take it by demise, then they would lose the rents reserved upon the said leases for years, for it was agreed, if this interest should take effect by bargain and sale, then an attornment is not necessary, for the Statute of Uses, 1535, executes the possession to it. The Statute of Enrolments, 1535, does not extend to it because no estate of freehold passes, but only an estate for years. Also, at this day a use and interest pass in a manner, uno flatu, together in an instant.

Fourthly, it was resolved that this election remains to them, notwithstanding the alteration of the estate by the second indenture, and notwithstanding the death of the lessor, and notwithstanding also the Queen was entitled to the wardship of the heir, as appears before, for they had an interest in them presently, which they before election might assign over, and which the executors of the survivor should have, although they all died before election, for here is not election to claim one of two several things by one and the same title, but to claim one and the same thing by one of two several titles; for where the things are several, nothing passes before election, and the election ought to be precedent, but when one and the same thing shall pass, there it passes presently, and the election of the title may be subsequent.

Therefore, if I have three horses and I give you one of my horses, in this case the election ought to be made in the life of the parties, for inasmuch as none of the horses is given in certain, the certainty and thereby the property begins by election. And with that agrees *Bullock* v. *Burdett* (1). The Bishop of Sarum, having a great wood of 1,000 acres (called Berewood), enfeoffed another of a house and 17 acres parcel of the wood, and made livery in the house, none of the wood passed before election, and, therefore, his heir shall not make election, but when one only thing is granted, and the party has election to take it in one manner or another, there the interest vests presently, and it shall be always in the election of the grantee or his executors at any time to elect in what manner and degree he will claim it. If I grant you a rent of 40s. out of my manor D. for years, you shall have in this case but one sum of 40s., but you shall have election to take it in what manner and degree you will, that is to say, either as a rentcharge to charge the manor by distress, or to charge the person of the grantor in a writ of annuity, and, therefore, the interest passes presently, and you, or your executors, at any time shall make election at your pleasure, and in the meantime the law will not determine it one way or other.

Therefore, it was resolved by all the justices of England, and afterwards adjudged in the Common Pleas in a writ of annuity between George Fulwood, plaintiff, and William Ward, defendant [*Fulwood* v. *Ward* (2)], where the case was that William Ward, being tenant for years determinable upon the life of Thomas Lord Paget of a barn and certain tithes in Stretton in the county of Stafford, granted a rent of £10 a year by his deed bearing date June 30, 1586, out of the said barn and tithes to George Fulwood for 15 years, with clause of distress. In 1589 Lord Paget died, and the writ of annuity was maintained for the arrearages after the death of the Lord Paget, for there was not election to have one of two several things, but to have one sum in one degree as a rentcharge or in another as an annuity. Therefore, presently by the grant the thing vested in the grantee, and his election always remains either to make it a thing real to charge the land, or a personal thing to charge the person. In that case the act of God, the death of the Lord Paget, by which the rentcharge was determined, was no determination of the annuity.

So in the present case, election being given to the lessees to have one and the same thing by one means or another, there the lessees have the interest vested in them presently, and election always remains in them in what manner they will take it. But when election is given to several persons, there nothing vests before election, and the first election stall stand. As if a man makes a lease for life of two acres, the remainder of one acre to I.S. and of the other acre to I.N., he who first makes election shall enjoy the one acre, and thereby the other acre has vested in the other. It was said that if a man gives two acres to another, habendum one acre to him in fee, and the other acre to him in tail, and he alienates both and has issue and dies, in this case the issue may bring a formedon in discender for which acre he will, for the election is not determined by his death, for an estate passes presently by the livery, and the issue shall take by descent. But in *Bullock* v. *Burdett* (1) if the heir of the feoffee should make the election, he would be in as a purchaser, for there nothing passes of the 17 acres to the feoffee before election, and by the law he cannot be a purchaser, for there these words "his heirs" are words of limitation.

So note, reader, these differences concerning election: (i) When nothing passes to the feoffee or grantee before the election to have one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make the election. But when an estate or interest passes presently to the feoffee, donee, or grantee, there election may be made by them or by their heirs or executors. (ii) When a thing passes to the donee, or grantee, and the donee or grantee has election in what manner or degree he will take it, there the interest passes presently, and the party, his heirs or executors, may make election when they will. (iii) When election is given to several persons, there the first election made by any of the parties shall stand. (iv) If election be given of two several

things, always he who is the first agent and who ought to do the first act, shall have the election. As if a man grants a rent of 20s. or a robe to one and his heirs, the grantor shall have the election, for he is the first agent, by payment of the one, or delivery of the other. So if a man makes a lease, yielding rent, or a robe, the lessee shall have the election, causa qua supra. With that agree the books, 9 Edw. 4, 36 B.; 13 Edw. 4, 4 B.; L. 5 Edw. 4, 6 B.; 11 Edw. 3. Annuity 27; 11 Ass. 8; 29 Ass. 55; 3 Edw. 3, Assize 175; 43 Edw. 3, Barre 194. But if I give you one of my horses in my stable, there you shall have election, for you shall be the first agent by taking or seizure of one of them: 2 Hen. 7, 23 A. And if one grant to another 20 loads of hazel or 20 loads of maple, to be taken in his wood of D., there the grantee shall have election, for he ought to do the first act, scil. to cut and take it. (v) When the things granted are annual things and are to have continuance, there the election remains to the grantor (in case where the law gives him election), as well after the day, as before; otherwise when the things are to be performed unica vice. Therefore, if I grant to another for life an annuity or a robe, at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuity in the disjunctive, for if he should bring his writ of annuity for one only and recover, this judgment would determine the election for ever, for he should never have a writ of annuity after, but a scire facias upon the judgment. Which reason Fitzherbert, in his Natura Brevium not observing, held an opinion contrary. But if I contract with you to pay you 20s. or a robe at the feast of Easter, after the feast you shall bring debt for the one or the other: vide 9 Edw. 4, 36 B.; 13 Edw. 4, 4 B., and the books before. (vi) The feoffee by his act and wrong may lose his election and give it to the feoffor, as if one enfeoff another of two acres, to have and to hold, one for life, the other in tail, and he before election makes a feoffment of both. In this case the feoffor shall enter into which acre he will, for the act and tort of the feoffee. (vii) Although the lessees, in the case in question, have entered generally, yet they may afterwards elect either to take by the demise or by the bargain and sale, for their general entry cannot be any determination of the election any more than, if one be executor and devisee of a term and he enters generally, it is no determination of his election.

[After the lessees made their election to take it by bargain and sale, thereupon they had the rents reserved upon the leases for years, which otherwise they could not have.]

MASTERS *v.* MASTERS

[Rolls Court (Sir Joseph Jekyll, M.R.), Easter Term, 1718]

[Reported 1 P.Wms. 421; 2 Eq. Cas. Abr. 352, pl. 12; 8 Vin. Abr. 312, pl. 29; 24 E.R. 454]

Equity—Marshalling—Will—Marshalling estate so that will can take full effect.

Where the personal estate was not sufficient to pay legacies bequeathed by a will and codicil and the real estate was liable to the legacies left by the will and not to those left by the codicil, it was decreed that the estate should be so marshalled that, so far as possible, the whole will might take effect and all the legacies be paid. The will charging the real estate with the payment of legacies could not extend to legacies in the codicil.

Will—Satisfaction—Gifts not ejusdem generis—Pecuniary bequest in will—Annuity given by codicil—Pecuniary legacy in will—Larger legacy by codicil. in will—Larger legacy by codicil.

Annuities given by a codicil, though given to the persons who were pecuniary legatees in the will and though of greater value, **held** not to be taken to be a satisfaction for the pecuniary legacies given by the will because the gifts were not ejusdem generis.

A larger pecuniary legacy given by the codicil to a person who was a pecuniary legatee under the will was not to be taken to be a satisfaction of the earlier legacy in the absence of express provision to that effect.

Will—Evidence—Illegible will—Evidence to decipher contents—False description of donee—Evidence to identify person intended by testator.

Where a will is written illegibly the evidence of persons skilled in the art of writing is admissible in deciphering what the testator meant. Where the name of a legatee has been falsely given the court will inquire to ascertain whom the testator intended.

Will—Gift of "all household goods"—All goods possessed by testator at time of death.

A gift of "all household goods" relates to the time of the testator's death, and under it passes all the household goods which he had at the time of his death.

Notes. Considered: *Duke of St. Albans* v. *Beauclerk* (1743), 2 Atk. 636; *Norman* v. *Morrell* (1799), 4 Ves. 769; *De Zichy Ferraris and Croker* v. *Hertford* (1843), 3 Curt. 468. Referred to: *Brudenell* v. *Boughton* (1741), 2 Atk. 268; *Hatton* v. *Hooley* (1773), Lofft. 122; *Vincent* v. *Stansfield*, *Hagergham* v. *Vincent* (1793), 4 Bro.C.C. 353; *Thomas* v. *Thomas* (1796), 6 Term Rep. 671; *Smith* v. *Jersey* (1821), 3 Bli. 290; *Williams* v. *Hughes* (1857), 24 Beav. 474.

As to marshalling, see 14 Halsbury's Laws (3rd Edn.) 611–615, and as to evidence to explain will and cumulative or substitutional gifts, see ibid., vol. 39, pp. 955 et seq., 1108–1111. For cases, see 20 Digest (Repl.) 526 et seq.; 49 Digest (Repl.) 1166–1173.

Cases referred to:

(1) *Hooley* v. *Hatton* (1773), 1 Bro.C.C. 390, n.; 2 Dick. 461; 28 E.R. 1197; sub nom. *Hatton* v. *Hooley*, Lofft. 122, L.C.; 49 Digest (Repl.) 933, *8765*.

(2) *Ridges* v. *Morrison* (1784), 1 Bro.C.C. 389; 28 E.R. 1195; 49 Digest (Repl.) 938, *8823*.

(3) *Foy* v. *Foy* (1785), 1 Cox, Eq. Cas. 163; cited 1 Bro.C.C. 392, n.; 29 E.R. 1110; 49 Digest (Repl.) 935, *8790*.

(4) *Duke of St. Albans* v. *Beauclerk* (1743), 2 Atk. 636; 26 E.R. 788, L.C.; 49 Digest (Repl.) 943, *8875*.

(5) *Jackson* v. *Jackson* (1788), 2 Cox, Eq. Cas. 35; 30 E.R. 17; 49 Digest (Repl.) 939, *8838*.

(6) *Coote* v. *Boyd*, *Coote* v. *Coote* (1789), 2 Bro.C.C. 521; 29 E.R. 286; 49 Digest (Repl.) 943, *8876.* A

Bill for an order for the payment of legacies bequeathed by the will of Mrs. Mary Masters.

Mary Masters by her will left legacies to several of her relations and others. To her nieces A., B., and C. she left pecuniary legacies, viz., to A. and B. £200 apiece, and to C. £400. Having a mother living, she gave all her household goods after her mother's death to be divided among her said three nieces, and also the best of her clothes. She likewise gave several specific legacies, and to the poor of two hospitals in Canterbury (naming them) £5 apiece. As to her lands, she devised them to her nephew and heir-at-law, the defendant Sir Harcourt Masters, charging them with the payment of her legacies above mentioned, and she made the defendant Sir Harcourt her executor. Subsequently, her mother died, by which a considerable increase of personal estate came to her, and thereupon she made a codicil giving pecuniary legacies to several to whom she had before given legacies by her will, many of which legacies were larger than what had been given them by her will, and she gave £5 per annum to all and every the hospitals (without saying where the hospitals were). She left annuities to several of the pecuniary legatees in the will, and gave to her three nieces, A., B., and C., all (leaving a blank) to be equally divided, and her clothes. Among her legacies, which were in figures, some of them were written so blindly (seeming to have been altered) that it was difficult if not impossible to read them or to distinguish what the legacies were, particularly in one place whether £100 or £300 was meant, and she gave to "Mrs. Sawyer" £200 when there was no such person ever known to her. It was alleged that she meant one Mrs. Swopper. She likewise bequeathed to her three nieces A., B., and C., £50 a year for their lives, and left £200 for a monument for her mother. Her codicil was not attested by any witness, and so, as was admitted, could charge no land. It was also admitted that both her real and personal estate were deficient in value to pay the legacies and annuities given by her will and codicil. B C D E F

The defendant, Sir Harcourt Masters, proved her will and codicil. On a bill brought for the payment of several of the legacies to several of the plaintiffs it was decreed by **SIR JOSEPH JEKYLL, M.R.:**

(1) that, the personal estate not being sufficient to pay the legacies both by the will and codicil and the real estate being liable to the legacies by the will and not to those by the codicil, the estate should be so marshalled that, so far as possible, the whole will might take effect and all the legacies be paid, and, therefore, that the legatees in the will should be paid out of the real estate, and, if that should be deficient, they must, as to the surplus, come in average with the legatees in the codicil, to be paid out of the personal estate, and, there being admitted to be a deficiency, that the land should be forthwith sold to prevent a greater deficiency, but that the specific legacies must be all paid, and not abate in proportion, but, on the contrary, that the charities, though preferred by the civil law, yet ought to abate in proportion for they were but legacies. It was objected that the £200 given for a monument for the mother ought not to abate in proportion, this being a debt of piety to the memory of her mother from whom the testatrix received the greatest part of her estate. To this the court inclined, and directed G H

> "that the whole £200 devised by the testatrix's codicil for building a monument for her mother, be paid and laid out accordingly . . . in case the said testatrix's personal estate shall not be sufficient to pay all the legatees and charities under the codicil, then such legatees and charities (except the £200 for the monument) are to abate in proportion." I

(2) that the will charging the real estate with the payment of the legacies above mentioned could not extend to legacies in the codicil, but, if the real estate had been charged with the payment of the testatrix's legacies in general, it would

A have taken in the legacies in the codicil, they being as much her legacies as those in the will.

(3) it being objected that, whereas the pecuniary legacies in the codicil exceeded the legacies in the will and were given to the same persons, this should be in satisfaction of the legacies in the will and that the legatees should not have both, and, particularly, that where the annuities given by the codicil were of greater value B than the legacies in the will and were given to the same persons, they should be a bar to such persons from claiming both, that the annuities by the codicil, though given to the persons who were pecuniary legatees in the will, and though of greater value, yet should not be taken to be a satisfaction for the pecuniary legacies given by the will, because the annuities were not ejusdem generis. The annuitants might die the next day after the death of the testatrix, and nothing being more uncertain C than life, consequently the latter gifts instead of being a bounty, might be a prejudice, if taken to be in satisfaction of the legacies by the will.

(4) that the codicil was part of the will and proved as part thereof, and that the greater pecuniary legacy, given by the codicil to the same person that was a pecuniary legatee in the will, should not be taken to be a satisfaction, unless so expressed; that it was, as if both the legacies had been given by the same will;* D and it seemed a circumstance tending to prove that the testatrix intended additional bounties, inasmuch as she, after the making the will and before her making the codicil, had an additional estate from her mother.

(5) on its being insisted that the devise of the household goods to the testatrix's three nieces could not pass those household goods which the testatrix had not at the making of the will, but came to the possession of afterwards by the death of E her mother, and that the codicil would not supply it, for the codicil gave all (with a blank) to her three nieces, that the devise of all one's household goods would pass all household goods that the testator had at the time of his death. But household goods were always changing and perishing, and, therefore, the will as to personal estate should relate to the time of the testator's death. Otherwise it would be very inconvenient, then a man must make a new will every day. Also the codicil F should, had there been occasion, have been explained by the will, though here the will was sufficient without the codicil. As to plate, if commonly made use of by the family, it should pass as household goods.

(6) where the will was written blindly and hardly legible, and as to the money legacies was written in figures, it was ordered to be referred to the Master to examine, and see what those legacies were, he to be assisted by such as were skilled G in the art of writing.

(7) likewise as to the legacy of £200 to Mrs. Sawyer, the Master to examine who the testatrix meant thereby, and whether the testatrix meant Mrs. Swopper who contended for the same. If the Master should find she was the person intended, then she to receive her legacy in proportion with the other legatees.

(8) as to the £5 per annum, to all and every the hospitals, it appearing that the H testatrix lived in Canterbury for many years and died there, and that she took

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* There seems to have been some mistake in the report of this part of the case, for where two legacies of quantity are given simpliciter to the same person by the same instrument, the presumption is against their being intended as cumulative; otherwise, where given by different instruments: *Hooley* v. *Hatton* (1), 1 Bro.C.C. 390 n., *Ridges* v. *Morrison* (2); I *Foy* v. *Foy* (3). In *Hooley* v. *Hatton* (1) Lord Bathurst conjectured that this passage in *Masters* v. *Masters*, was wrongly pointed, and that the semicolon, which follows the words "unless so expressed" ought to have been placed after the words "that it was" by which means the passage would stand, "should not be taken to be a satisfaction, unless so expressed that it was; as if both the legacies," etc. Where both legacies are given for the same cause, they shall not be cumulative, whether in the same or different instruments: *Duke of St. Albans* v. *Beauclerk* (4). Otherwise where one is given generally, and the other for an express cause: *Ridges* v. *Morrison* (2); but if it be collected from the context whether the testator meant an addition to, or substitution for the first bequest, these presumptions may be rebutted: *Jackson* v. *Jackson* (5); *Coote* v. *Boyd* (6). Very slight circumstances have been considered as sufficient to show a testator's intention, either one way or the other.

notice by her will of two Canterbury hospitals, this charity was held not to be void for uncertainty, but to have been intended for all the hospitals in Canterbury, but not to extend (as was pressed) to a hospital about a mile out of Canterbury, though it was founded by the same Archbishop of Canterbury and governed by the same statutes. This the court decreed notwithstanding it was objected that they ought not to go out of the words of the will and confine the general words "all hospitals" to those in Canterbury. The court did this the rather, because these charities, if they prevailed, would be perpetuities of £5 a year and by that means create a deficiency, and, consequently, in a great part defeat the rest of the will as to plain legacies, in favour of those that were doubtful.

Decree accordingly.

BLACKBORN *v.* EDGLEY

[Lord Chancellor's Court (Lord Parker, L.C.), Hilary Term, 1719]

[Reported 1 P.Wms. 600; 24 E.R. 534]

Will—Real estate—Devise of house "with the appurtenances"—Garden and orchard passing with house—Devise "with lands appertaining"—Passing of all lands enjoyed with house.

By the devise of a house "with the appurtenances" only the garden and orchard will pass with the house, but the devise of a house "with the lands appertaining" will pass all those lands which were before constantly enjoyed with the house and the profits of which were applied to the maintenance of the house.

Undue influence—Parent and child—Bounty from son to father—Bond for payment of annual sum—Son's free act.

A son in good financial circumstances, at the request of his father, but without his privity and in his absence, executed a bond to pay his father £120 a year.

Held: as this appeared to be the son's free act and what he thought himself obliged in honour to do, and there was no evidence to impeach it, the bond would not be set aside in equity.

Will—Issue—"Without issue"—Reference to previous gift to issue—"Without such issue."

In a devise of land to A. for life, and if A. die without issue, then to B., though here is an express estate for life to A., yet the subsequent words will turn it into an estate tail, but where lands are devised to A. for life, remainder to trustees, etc., remainder to his sons in tail male, if A. dies without issue, this will not give an estate tail to A., but the words "without issue" must be intended to mean "without such issue."

Notes. Considered: *Stanley* v. *Lennard* (1758), 1 Eden, 87; *Baker* v. *Tucker* (1850), 3 H.L.Cas. 106. Referred to: *Letheullier* v. *Tracey* (1754), Amb. 220; *Campbell* v. *Harding* (1831), 2 Russ. & M. 390; *Tarbuck* v. *Tarbuck* (1835), 4 L.J.Ch. 129; *Ellicombe* v. *Gompertz* (1837), 3 My. & Cr. 127; *Key* v. *Key* (1853), 4 De G.M. & G. 73; *Towns* v. *Wentworth* (1858), 11 Moo.P.C.C. 526.

As to property passing under a will, see 39 Halsbury's Laws (3rd Edn.) 1012 et seq., and cases there cited. As to undue influence of parent over child, see 17 Halsbury's Laws (3rd Edn.) 672 et seq.; and for cases see 25 Digest (Repl.) 281–283.

A Cases referred to:

(1) *Bamfield* v. *Popham* (1703), Holt, K.B. 233; 2 Vern. 449; 1 Eq. Cas. Abr. 183; 1 P.Wms. 54; Freem. Ch. 266; 90 E.R. 1028; sub nom. *Popham* v. *Bamfield*, Freem. Ch. 269; 2 Eq. Cas. Abr. 308; 1 Salk. 236; 49 Digest (Repl.) 1075, *10,018*.

(2) *Sonday's Case* (1611), 9 Co. Rep. 127 b; 77 E.R. 915; 49 Digest (Repl.) 1255, *11,272*.

B

Bill for administration of an estate.

The testator, Hewer, being a single man and having a vast real and personal estate, and a cousin, Anne the wife of Samuel Edgley, for whom and whose issue he intended the bulk of his estate, by will dated Sept. 9, 1715, after having declared his intention that his name and family should be continued by some of the children of Anne Edgley, directed that his manner of house-keeping at his dwelling-house at Clapham should be continued for one year after his death, as also his servants at their old salaries, and that £1,200 per annum should be allowed Anne Edgley, for that purpose. He further directed that after the expiration of that year Anne Edgley should continue to live at his house at Clapham, and that her son, Hewer Edgley, should cohabit with her there in the same manner as at the time of the will he did with the testator. Anne Edgley was to be at the charge of housekeeping, servants' wages, and coachhorses to the number that he maintained, and to enable her so to do he directed that £1,200 per annum should be paid to her by quarterly payments for her life. If her son Hewer Edgley should marry and Anne Edgley should think fit to live away from him and to quit the house and furniture, then she was to have £250 per annum for life. He devised all his freehold estate and also the residue of his personal estate to trustees on trust to convey all his freehold estate to Hewer Edgley for life, without waste, remainder to trustees during his life to preserve contingent remainders, remainder to his sons in tail male, remainder to his daughters in tail general as tenants in common, with power to Hewer Edgley to make a jointure of any part not exceeding half the premises. If Hewer Edgley should die without issue, he devised that the premises should be settled in fourths, viz., one fourth to his cousin John Blackborn in fee, another fourth to his cousin Abraham Blackborn in fee, another fourth to his cousin Anne Jackson in fee, and the remaining fourth to his cousin Susanna Edgley, youngest daughter of Anne Edgley, in fee. If all or any of the said four remainder-persons should be dead at the time when by virtue of the settlement his estate was to devolve upon them, then the fourth part to which the person so dead should have been entitled to if living should be conveyed to the heirs of the person so dead. The testator devised the residue of his personal estate (subject to the afore-mentioned legacies) to be laid out in land and settled in the same manner as he had before devised his real estate. He made his trustees executors, and died.

C D E F G H

The testator was seised in fee of a little land which was always employed by him for producing hay and corn which was constantly spent in the house, and the land was ploughed with the coachhorses which the testator kept.

Hewer Edgley married the daughter of Sir Simeon Stuart, and he and his wife were not inclined to live with the mother Anne Edgley at the house at Clapham. Hewer Edgley appointed a jointure to his wife exceeding a moiety of the premises, and Susanna Edgley, one of the four devisees in remainder, died without issue unmarried. Samuel Edgley the father of Hewer, prepared a bond for Hewer Edgley to sign for the payment of £120 per annum to him (Samuel) for life, which the son for some time declined to execute saying it was more reasonable that the father should depend upon his honour. On that Samuel left the bond with him, declaring that if he would not sign it, he might let it alone. Hewer Edgley, in the absence of his father, just before he went abroad did sign it, and directed that it should be delivered to his father.

I

The following points were debated, and resolved by **LORD PARKER, L.C.:**

(1) It was objected that though the house at Clapham passed to the mother for her life if she would live there, yet only the house and curtilage would pass, and not the land employed for producing hay and corn, and that rather because all the testator's lands and freehold estate were devised elsewhere to trustees for the cousin Hewer Edgley for life, etc.

Per Curiam: By the same reason it might be objected that the house at Clapham is devised away, which, however, is not pretended. It is true that by the grant or devise of a house "with the appurtenances," only the garden and orchard will pass with the house, but the devise of a house "with the lands appertaining" will pass the land in question. The intention of the testator was that after his death, during the life of his kinswoman Anne Edgley, everything should be carried on and transacted as it was in his lifetime, and this to such a nicety as that the same number of servants and even of coachhorses was to be employed, the same hospitality observed, the same horses used in ploughing the lands, which could not be unless the lands were to continue as before to be enjoyed with the house. Wherefore as it seems to have been his intention not to part them, let those lands which were before constantly enjoyed with the house, and the profits of which were applied to the maintenance of the house continue to be so enjoyed.

(2) It was contended that it appeared plainly that Hewer Edgley and his wife and family were to have the liberty of cohabiting with and being dieted by his mother at this house at Clapham, and, therefore, if he should waive that or elect to live away from his mother, this would exempt her from any necessity of expending so much, and, consequently, there ought to be a proportionable abatement out of the £1,200 per annum which was allotted to be paid to her for housekeeping.

Per Curiam: I admit that Hewer Edgley might live at the house at Clapham with his mother as formerly he did with the testator, but if he would live there with a greater number of servants or horses than were there in the testator's lifetime, it seems to me that his mother is not bound to maintain them. She is only to maintain him in the same plight and manner as the testator did. Neither ought there to be any abatement of the £1,200 per annum by reason of the son's absence any more than there ought to have been for the years that Hewer Edgley travelled and was abroad after the testator's death. As though he had died, there should be no abatement of the £1,200 per annum, by the same reason there should be no abatement in respect of the voluntary absence of Hewer Edgley, for the testator intended that in all events during the life of his cousin Anne Edgley there should be the same hospitality as in his lifetime. Only if Anne Edgley should leave the house (which was left entirely to her election) then, indeed, she was to have but £250 per annum instead of the £1,200 per annum, but the latter sum was to be paid her very exactly (viz.), quarterly, during her stay there, and care is taken that even the repairs of the house shall be paid out of the other part of the testator's estate.

(3) It was objected that the jointure made by Hewer Edgley on his wife exceeded a moiety of the premises, and, consequently, having gone beyond the power, was void.

Per Curiam: Here neither is nor can be any jointure for as yet Hewer Edgley has no legal estate till the trustees convey to him, and until he has an estate he can pass none. Therefore, I can take no notice of this equitable appointment, nor can it properly come in question at this time, not being to take effect till after the husband's death, and perhaps never will, as he may survive his wife.

(4) It was objected that Hewer Edgley by virtue of the words "if he die without issue of his body" should have an estate tail in the premises, and then it would be in his power to bar the remainder by a recovery, and this was the rather an estate tail in him for otherwise the daughters of his son could never take which would be against the testator's intention. To which it was answered that here was an express estate for life limited to Hewer Edgley, and, the words "if he should die without issue" being only words of implication, would not merge and destroy an express state for life: see *Bamfield* v. *Popham* (1).

Per Curiam: Words of implication should not turn an express estate for life into an estate tail. If I devise an estate to A. for life and after his death without issue then to B., this will give an estate tail to A. according to *Sonday's Case* (2). But here, being a limitation upon Hewer Edgley's death to his sons and after to his daughters the words "if Hewer Edgley should die without issue" must be intended to mean if he should die without such issue. As to what had been urged, that unless these words were to create an estate tail in Hewer Edgley, his son's daughters could not take, it does not appear that the testator intended Hewer Edgley's son's daughters should take, for he might think that on Hewer Edgley's dying without issue male, his name and family would be determined, for which reason he might limit it over to the daughters of Hewer Edgley himself. Besides, the son of Hewer Edgley would be tenant in tail, and when of age might, by docking the entail, give the premises to his daughters.

(5) It was objected that on the death of Susanna Edgley the devisee of one-fourth of the premises in remainder, if Hewer Edgley should die without issue, her fourth part was not to descend to her elder brother and heir-at-law Hewer, but to be subject to an executory devise to such person as would be heir at the death of Hewer Edgley without such issue as aforesaid, and not to vest in the meantime.

Per Curiam: This remainder in fee of a fourth part does vest in Hewer Edgley as heir of his deceased sister Susanna, for, she having a devise of the fourth part to her in fee, the words directing a conveyance to be made in case of her death to her heir are no more than what would have otherwise been implied, et expressio eor' quæ tacite insunt nihil operatur.

(6) Neither is the furniture of the house at Clapham to be sold while Mrs. Anne Edgley stays there, for, it being said by the will that, if she thinks fit on the marriage of Hewer Edgley to quit the house and goods, this shows that until then she was to enjoy them. But the words are not strong enough to carry the goods as heirlooms with the house after Mrs. Anne Edgley should quit it or die. Then they shall be subject to the trusts of the will.

(7) As to the son's bond to pay the £120 per annum to his father, the words said by the father, "that if the son would not sign it he might let it alone," might be spoken in such a manner as to amount to a threatening with design to intimidate the son, but it might also be otherwise. The son having said that this ought to be left to his honour, the father seems to have acquiesced to it, after which the son, as bound in honour, without the privity of his father and in his absence, executed the bond, and directed it to be delivered to his father. So that for ought appears it was his free act, and what he thought himself obliged to honour to do, and, therefore, without any proof to impeach it should not be set aside in equity.

EVELYN AND OTHERS *v.* EVELYN AND OTHERS

[LORD CHANCELLOR'S COURT (Lord King, L.C., assisted by Lord Raymond, C.J., and Sir Joseph Jekyll, M.R.), Hilary Term, 1731]

[Reported 2 P.Wms. 659; 2 Barn.K.B. 118; 24 E.R. 904]

Guarantee—Surety—Mortgagor of estate to secure debt of another—Surety of person whose debt secured.

A person mortgaging his estate to secure the debt of another stands in the relation of surety towards the person whose debt is thus secured who shall exonerate the estate.

Accordingly, if A., seised in fee, mortgages his land, leaving B. his son and heir, and B. dies leaving C. his heir, B.'s personal estate shall not be applied to pay the mortgage, because it was not B.'s debt, and, though, the mortgage being transferred in B.'s time, B. covenants to pay the money, yet, the debt not being originally the debt of B., his covenant is only a surety, and C. shall take the land cum onere.

Portions—Vesting—Portions raised out of profits of land—No time mentioned for payment—Interest.

Where portions are directed to be raised out of the rents and profits of land, but no time is mentioned for payment, they become a vested interest immediate on the relevant death. Where a certain time is limited for the payment of the portion it carries interest from that time and may imply a power of sale.

Power to Encumber—Construction—Power to encumber estate of another—Rigid construction—Liberal construction where power to dispose of own estate.

Where a person has a power to make leases or any other charge encumbering another person's estate the power is to have a rigid construction, but where the power is to dispose of his own estate the most liberal interpretation is to be made.

Notes. Applied: *Cowper* v. *Scott* (1731), 3 P.Wms. 119; *Okeden* v. *Okeden* (1738), 1 Atk. 550. Referred to: *Hall* v. *Carter* (1742), 2 Atk. 354; *Allan* v. *Backhouse* (1813), 2 Ves. & B. 65.

As to rights of a surety against principal debtor, see 18 HALSBURY'S LAWS (3rd Edn.) 474 et seq., and as to vesting of and interest on portions, see ibid., vol. 34, pp. 501, 502. For cases, see 26 DIGEST (Repl.) 124 et seq.; 40 DIGEST (Repl.) 671 et seq.

Cases referred to:

(1) *Lord Howard* v. *Napier* (1724), 5 Bro. Parl. Cas. 221.

(2) *Countess of Coventry* v. *Earl of Coventry* (1724), 2 P.Wms. 222; 1 Stra. 596; Gilb. Ch. 160; 9 Mod. Rep. 12; 1 Eq. Cas. Abr. 348, pl. 19; 2 Eq. Cas. Abr. 660, pl. 8; 24 E.R. 707, L.C.; 40 Digest (Repl.) 642, *1344*.

(3) *Edwards* v. *Freeman* (1727), 2 P.Wms. 435; 1 Eq. Cas. Abr. 249; 24 E.R. 803, L.C.; 40 Digest (Repl.) 668, *1623*.

(4) *Fitzwilliam's Case* (1604), 6 Co. Rep. 32a; Moore, K.B. 681; 77 E.R. 300; 40 Digest (Repl.) 593, *966*.

(5) *Sayle* v. *Freeland* (1680), 2 Vent. 350; 86 E.R. 480; 37 Digest (Repl.) 265, *229*.

(6) *Lady Orby* v. *Mohun* (1706), 2 Vern. 531, 542; affirmed sub nom. *Duchess of Hamilton* v. *Mordaunt* (1726), 6 Bro. Parl. Cas. 145; 2 E.R. 989, H.L.; 40 Digest (Repl.) 782, *2654*.

(7) *Jenkins* v. *Keymeys* (*Keymes*, *Kemishe*) (1668), 1 Rep. Ch. 275; 1 Cas. in Ch. 103; 1 Lev. 137; 21 E.R. 571, L.C.; 25 Digest (Repl.) 258, *663*.

(8) *Lady Clifford* v. *Earl of Burlington* (1700), 2 Vern. 379; 23 E.R. 841; 40 Digest (Repl.) 646, *1385*.

(9) *Lord Kilmurry* v. *Geery* (1713), 2 Salk. 538; 1 Eq. Cas. Abr. 341; 91 E.R. 456; 40 Digest (Repl.) 692, *1872.*

(10) *Earl of Rivers* v. *Earl of Derby* (1688), 2 Vern. 72; 23 E.R. 656, L.C.; affirmed (1689), 14 Lords Journals, 195, H.L.; 40 Digest (Repl.) 682, *1772.*

(11) *Ivy* v. *Gilbert* (1722), Prec. Ch. 583; 2 P.Wms. 13; 24 E.R. 261, L.C.; affirmed sub nom. *Ivie* v. *Gylberte* (1723), 6 Bro. Parl. Cas. 68, H.L.; 40 Digest (Repl.) 666, *1591.*

Bill brought by the three infant daughters of George Evelyn for raising their portions of £8,000, the eldest of the daughters being about the age of eight years, and cross-bill by Edward Evelyn by an order for the payment off of a mortgage.

George Evelyn, the grandfather of the infant plaintiffs had three sons, John, George, and the defendant Edward Evelyn. George Evelyn, the father, being tenant for life, remainder to his eldest son John in tail male, of part of the premises, on Oct. 20, 1698, together with John, by deed and recovery settled the manor of Walkhamstead, alias Godstone, in Surrey, to the use of himself for life, sans waste, remainder to John for life, remainder to his first, etc., son in tail male successively, remainder to his second son, George Evelyn, for life, remainder to his first and other sons in tail male successively, remainder to his third son the defendant Edward Evelyn in like manner, with trustees to support all these contingent remainders, remainder to the heirs male of the body of George Evelyn, the father, remainder to him in fee, with a power to George Evelyn, the father, by deed or will, to charge by lease, mortgage or otherwise, the premises to himself limited for life, with raising or paying any sum not exceeding £6,000, also with a power to every of his sons when in possession, by deed attested by three witnesses, to limit, before or after marriage, to the wife of any of the said sons for a jointure all or any part of the premises so as such jointure should not exceed £100 per annum for every £1,000 which such son should have received as the fortune of the wife, with further power to his said sons respectively when in possession by any deed or writing under hand and seal, attested by three credible witnesses, to make any lease or leases for years sans waste (but without prejudice to any jointure which should be made by virtue of the said power) for the raising of portions for the daughters of such sons, so that such portions should not exceed that which the son making such leases should have had with his wife, and so that such leases should not take effect until there should be a failure of issue male of such son so making such lease, with the usual power for George Evelyn, the father and his sons when in possession to make leases for twenty-one years at the most improved rent. By other indentures of lease and release dated Oct. 20 and 21, 1698, George Evelyn, the father, in consideration that his son John had joined with him in the said common recovery and settlement, did settle other lands, viz., the manor of Tandridge, of which he was seised in fee, to the same uses as the manor of Walkhamstead alias Godstone was settled by the former deed, with the difference only that as to the son's power of leasing for raising daughters' portions, these words were added, "so as such lease or leases should cease and determine upon the raising of such portions, and costs and charges for raising the same."

On April 1, 1699, George Evelyn, the father, in pursuance of his power, mortgaged part of the land for £1,500 for the term of 1,000 years, which mortgage afterwards by mesne assignment became vested in Sir Thomas Pope Blunt, with a covenant from George Evelyn the son for payment of the mortgage money, and Sir Thomas, the mortgagee, covenanted to re-assign to George Evelyn the son. In June, 1699, George Evelyn, the father, died. In October, 1703, John Evelyn the eldest son, died without issue, upon which George Evelyn, the second son, entered upon the premises comprised in the settlement. By an indenture dated Aug. 22, 1720, upon the marriage of George Evelyn with Mary, the daughter of Mr. Garth, whose portion was agreed to be £8,000, it was provided that, in consideration of the then intended marriage and £8,000 marriage portion, and in pursuance of the powers contained in the settlement and indentures of 1698 or any other, George

Evelyn did limit and appoint to and to the use of Mary, his then intended wife, for her life for her jointure and in bar of dower, divers messuages and lands in Godstone, not exceeding the value of £800 per annum. Also in pursuance of the power in the settlements, or any other, George Evelyn, in case of failure of issue male between him and Mary, granted and leased to trustees (therein named) all the premises limited to the said Mary for her life for her jointure and all other the manors and lands comprised in the settlements, to hold to the said trustees for the term of 500 years to commence and take effect from and after failure of issue male of the body of George Evelyn, upon trust that, if there should be failure of issue male of the body of George Evelyn on the body of Mary and if he should have one or more daughters by her, then the trustees of the said 500 years' term should, by and out of the rents, issues and profits of the premises comprised in the term, or by sale, mortgage or lease thereof, or of any part thereof, or by any other ways or means as to them in their discretion should seem meet, as soon as conveniently might be after the decease of George Evelyn (or in his lifetime if he should think fit to have the same sooner raised, and so direct) levy and raise the sum of £8,000 for the portion or portions of such daughter or daughters to be paid to her or them and equally divided among them, if more than one, share and share alike, with a proviso that the term should not prejudice the jointure, and that immediately after raising the £8,000 with all costs, etc., the said term should cease.

The marriage took place, but in 1724 George Evelyn died intestate, leaving the defendant Mary, his widow, and three daughters, who by their mother in 1725 brought their bill against Edward Evelyn and James Evelyn, his eldest son (being the next remainderman in tail), praying a present sale of the 500 years' term to raise the portions, the eldest daughter being not above four years old at the time of bringing the bill. On the other hand, the defendant Edward Evelyn and his son brought their cross-bill against Mrs. Evelyn, the mother (afterwards married to Governor Bohun), being the administratrix of her former husband George Evelyn, praying that the personal estate of her late husband should be applied towards paying off the mortgage of £1,500 and in exoneration of the real estate.

These causes coming on at first before Sir Joseph Jekyll, M.R., in the absence of Lord King, L.C., he declared that the powers in the deeds of Oct. 20 and 21, 1698, were well executed, and directed that it should be referred to the Master to state the value of the real and also of the personal estate of George Evelyn, the late husband of Mary. The Master stated the real (beyond the jointure) to be £91 per annum, the personal estate to be about £4,000, and the debts (besides the mortgage) to be about £200. These causes being ordered to be set down for hearing before the Lord Chancellor upon the Master's report, and for further directions, and upon the petition of Edward Evelyn and James Evelyn, his son, alleging that they apprehended themselves aggrieved by such part of His Honour's decree whereby the powers in the deeds of Oct. 20 and 21, 1698, were declared to be well executed, in regard the petitioners conceived that, however the term might be well raised, yet that the said powers touching the trusts were not well declared nor well executed or warranted by the above mentioned deeds, it was ordered that these causes should be set down to be re-heard touching the matters in the petition mentioned at the same time that the matter of the Master's report was set down for hearing.

LORD KING, L.C., delivered the following judgment: As to the question whether the personal estate of George Evelyn, the son, should be applied to pay off the mortgage made by George Evelyn, the father, in regard the son covenanted to pay this mortgage money, whereupon the mortgage was to be reassigned to him, or as he should direct, we agree that the personal estate of the son should not be applied to pay off this mortgage made by the father, forasmuch as the charge was made by George Evelyn, the father, in pursuance of his power to charge the premises, and, as he had such power, the defendant Edward must

be contented to take the land cum onere. This being the original debt of George Evelyn, the father, though his personal estate, if any such were to be found, would be liable thereto, yet the son's personal estate ought not to be charged with the father's debt, and notwithstanding that the son did afterwards, on the assignment to Sir Thomas Pope Blunt, covenant to pay the mortgage money, yet since the land was the original debtor, this covenant from the son should be considered only as a surety for the land.

It is not like the case of Sir John Napier [*Lord Howard* v. *Napier* (1)], where part of the estate of Sir John, the mortgagor, was after his death settled by a private Act of Parliament in trustees as a fund to pay all his debts, and, Sir Theophilus, the son and heir of Sir John, disposing of that fund, was consequently answerable for the debts, having had the benefit of the fund set apart for them, for which reason it was but just that upon his death his personal estate should be answerable for the debts of his father. In the present case there was no fund for payment of debts that came to the son, but the land was the original debtor, and must continue so, there being nothing substituted in its place.

In the common case where a mortgagor covenants to pay and dies, though quoad the mortgagee the land may be looked upon as the security on which he relies, yet, if the mortgagor covenants to pay and does receive the money, he is the original debtor, and his personal estate shall go to ease the land in favour of the heir. But here George Evelyn, the son, was not the original debtor. His father was, who actually received the money. In *Countess of Coventry* v. *Earl of Coventry* (2), where Gilbert, late Earl of Coventry, on his marriage with the daughter of Sir Strensham Masters (the earl being but tenant for life with a power to make a jointure of lands not exceeding £500 per annum on any wife he should marry) covenanted in consideration of the intended marriage that he or his heirs would after the marriage, according to the power given him by his father's will or otherwise, settle lands of £500 per annum on his wife for her jointure, and it being in proof that the late earl directed his steward to look over his rent-rolls for a fit parcel of the estate to make good the jointure, and afterwards the jointure deed was drawn and engrossed, but not executed, though this depended only on a covenant, yet the jointure of land being the chief thing in view, the decree was that the land should be settled and the covenant not made good out of the personal estate. In like manner, in *Edwards* v. *Freeman* (3), though the wife's jointure and the daughter's portion were secured by articles which were never completed by a settlement, however, those articles being to settle lands and the covenantor leaving lands sufficient to answer it, it was decreed that the daughter's portion should be raised out of the lands, and the personal estate of Mr. Freeman, the covenantor, not be applied in exoneration of the land. So that as to that part of the cross-bill which prayed the mortgage money should be paid out of the personal estate of George Evelyn the son, the same is dismissed with costs.

[As to the other point (which was the most considerable) it was agreed that this £8,000 should be raised out of the rents and profits of the premises comprised in the 500 years' term, and not by any sale or mortgage thereof, and that no more than the sum of £8,000 in the whole should be raised, and the profits be accounted for from the death of George Evelyn the husband.]

SIR JOSEPH JEKYLL, M.R., said he would consider the nature of such powers in general, the words made use of in the present case, and the precedents in the like cases for securing and raising portions for daughters.

As to the nature of such powers, they were to be taken strictly, being to charge, burden and encumber the estate of a third person: vide *Fitzwilliam's Case* (4), also *Sayle* v. *Freeland* (5), on which occasion Lord Nottingham, L.C., makes this distinction: where a man has a power to make leases or any other charge which is to encumber a third person's estate, such powers are to have a rigid construction, but where it is to dispose of his own estate (as in that case the party who had the power was tenant in tail) the most liberal interpretation is to be made.

In 2 Vern. 531, 542 (*Lady Orby* v. *Mohun* (6)), a tenant for life with power to make leases of lands usually let at the ancient rent made a general lease to J. S. of all his lands usually let, reserving the ancient rent, and though this general lease followed the words of the power, nevertheless since, if good against the remainderman, it would put a difficulty upon him in his suit for the rent to set out what was the ancient rent for every particular parcel of land, and might endanger his being frequently nonsuited before he could be able to recover the rent from the lessee, it was adjudged in Chancery, and affirmed in the House of Lords, that such a general lease was not warranted by the power to bind the remainderman. This shows that powers binding the interest of persons in remainder ought to be taken strictly, and, as powers in settlements to uses are raised by way of use, which at common law were trusts, they were originally cognisable and determinable in courts of equity. In *Jenkins* v. *Keymes* (7) (1 Lev. 137) a tenant for life, remainder to his eldest son in tail, had power to charge the land with £2,000. They both by lease and release joined in a mortgage in fee of the premises to J. S. under proviso to be void on payment of the £2,000 and interest with a covenant for further assurance, but no mention made of the power. It was decreed by Sir Orlando Bridgman, Lord Keeper, that this mortgage should not be intended as an execution of the power, but only as a common mortgage, and so the father and son being both dead, the mortgage was not binding on the issue of the son either in law or equity, and consequently the money was lost.

Whence it appears that courts of equity are not free in extending powers given to tenant for life, to bind a remainderman. In *Lady Clifford* v. *Earl of Burlington* (8), Lord Clifford by his marriage settlement was made tenant for life, remainder to his first, etc., son in tail, with power for him to make a jointure not exceeding £1,000 per annum, and his Lordship in treating of the marriage covenanted to settle a jointure of £1,000 per annum, giving in a particular of lands as of that value, and settling them, but the lands proved to be only £600 per annum, whereupon after Lord Clifford's death, a bill being brought by the jointress against the issue in tail to have the jointure made up pursuant to the marriage articles, the decree was that the issue in tail should make up the jointure £1,000 per annum. It is true that in that case relief was given to a purchaser against a purchaser. However, this is to be looked on as a family case where it might be thought severe not to make good her jointure to a lady who brought a considerable fortune, and the decree made (probably) on a faint defence. Besides it does not appear to have been thought a right decree, or even sufficiently approved of by the reporter himself. At least it is to be considered that there was a power to make a jointure of £1,000 per annum a covenant, and also an intention to execute it, whereas in the present case what is asked for the daughters seems not warranted by the original power which cannot be exceeded by the subsequent settlement of the portion. Such part, therefore, of the deed securing the portion as exceeds the original power is to be looked upon as of no force. The sons of Mr. Evelyn, the father, who are remaindermen in his settlement, are at least to be regarded as much as an heir-at-law from whom nothing shall be taken but by necessary implication, and though George Evelyn, the son, in the execution of the power seems not to have regarded the convenience of the remainderman, yet the plaintiffs, the daughters, can ask nothing but what the power in the settlement of George Evelyn, the father, warrants.

There are two ways of raising portions—one by sale or mortgage, the other by perception of profits. Where a particular certain time is limited for the payment of the portion, there it carries interest from that time, and may imply a power of sale, but here no certain time is limited for payment, which very much influences the present case, and distinguishes it from others. It is not said or implied that the portions should be paid or raised upon the death of George Evelyn, the son, without issue male, though it is true that the right thereto did then vest in the daughters, viz., a right to the bare sum of £8,000 to be raised by perception of profits, and as it were unreasonable in itself to raise the portions by a way so

destructive to the estate and family as a sale would be, it must be more particularly hard to do it in the present case, when the daughters, for whom they are to be raised, are of such tender years, and when it moreover appears to have been the plain intention of the maker of the settlement to preserve the bulk of his estate in his name and family.

It is objected that the word "portion" always implies a sum in gross, and to be paid all at once. If the daughters are sure of their portions, though the same are not to be raised or paid in so beneficial a manner as they would have them, it is however sufficient. The writ de rationabili parte bonorum never required that the children's shares should be paid in a gross sum.

It is observable that the power given or reserved by Evelyn, the father, to charge the land with £6,000 is by lease, mortgage, or otherwise without restriction, but when he comes to make a settlement of his fee-simple lands, his son's power of leasing for raising daughters' portions is restrained, so as such lease or leases shall cease and determine when the money shall be raised. This is the strongest argument imaginable that Evelyn, the father, did not intend a sale of the premises for the raising of these portions, but only to do it by perception of profits, when even a lease thereof was not to continue after the portions raised, which could not be if after those sums were raised, and the children paid, the term were still to subsist for the benefit of a purchaser or mortgagee. It is not possible that the term can cease upon raising the portions in any other sense or way than by raising them out of the growing profits, and then though the execution of the power by Evelyn, the son, were it defective, would be supplied or helped in equity, yet where it comes to exceed the power equity will never support such excess. The truth is that there may be some hardship either way to the daughters of Evelyn the son, on the one side, and to the remainderman, the brother, on the other, but the greater hardship seems likely to fall on the remainderman if the estate (being a reversion) should now be sold, whereas, if the daughters have their portions of £8,000, though not paid in so beneficial a manner as they could wish, it still is a plentiful provision.

In the next place, it appears that the power to raise the portions for the daughters of Evelyn, the son, was so as the same should not exceed the portion which their father should have with his wife, which, being but £8,000, is the same as if it had been expressed in the power that the daughters' portions should not exceed that sum, and this shows that interest for the £8,000 was not to be raised, for that might double the sum and eat up all the reversion. As to this point, what has been cited from *Lord Kilmurry* v. *Geery* (9) is not applicable, the decree there being grounded on the particular circumstances of the case. The power arose upon a settlement made with the approbation of trustees by a person during his infancy and confirmed by Act of Parliament. By the settlement a power was reserved of charging divers of those lands at any time during his life with the sum of £3,000. He borrowed this sum of the doctor [Dr. Geery], and, having executed his power while an infant, died soon after he came of age. The plaintiff, his son, brought his bill to redeem on payment of the principal sum borrowed, but the court then decreed a redemption upon the common terms of payment of principal, interest and costs, because here was a power given to him to raise money, and immediately to give security, which was actually done, and although, perhaps, had he been of age at that time, he should have been obliged to keep down the interest during his life, yet being an infant at the time intended for the execution of this power, and, therefore, not capable of making his person liable to any part of the engagement, the land must, from the necessity of the thing, have stood engaged for interest as well as principal or it had been impossible for him during his infancy to have raised any money at all, which the nature of the transactions required.

Lastly, His Honour cited most of the cases that had been adjudged in relation to portions charged on real estates, but took notice that the following were the principal cases proving that when no time was limited for the payment of portions, and the daughters claiming the same were of tender years, though the right to

the portions vested in such infant daughters, yet they were to be raised by rents and profits. A

First, in *Earl of Rivers* v. *Earl of Derby* (10), on a marriage lands were limited to the husband for life, remainder to the wife for life, remainder to the first, etc., son in tail male, remainder to J. S. in fee, with a proviso that, if there should be no issue male and a daughter of the marriage living at the death of the husband, then the trustees should stand seised of the premises to the intent that such B daughter should receive £10,000 out of the rents, revenues and profits thereof, and £100 per annum for maintenance. This £10,000 was to be for her portion without appointing any time of payment. There was no son, and but one daughter who having lived to seventeen died unmarried. It was decreed that the portion of £10,000 did go to her executor, and was to be raised out of the profits by the trustees, so that there was the case of a portion vested, decreed to be paid out of C the profits, and, which was likewise a further answer to the objection, that by the word "portion" was to be meant a sum to be paid in gross.

Secondly, in *Ivy* v. *Gilbert* (11), decreed by Lord Macclesfield, and affirmed by the House of Lords, a trust term was limited to raise £1,500 for daughters' portions by rents, issues and profits, or by leasing for one, two, or three lives at the old rent, and it was decreed that directing the portion to be raised in this particular D manner implied a negative, that it should be raised in no other manner, and, therefore, not by mortgage or sale, and that no more money be raised than the £1,500 without interest, which was exactly the same with the principal case, an instance of a portion to be raised by perception of profits without interest.

His Honour concluded that there was not one single precedent where a sale had been decreed of a trust term for a portion appointed to be raised by rents and E profits, and no time limited for payment.

LORD RAYMOND, C.J., relied much on the intention of the maker of the settlement, which appeared to be plainly for preserving the estate in the male line of the family, so that there could be no design to extend the power for raising portions for daughters to a sale or mortgage. Consequently, such power being neither F express or implied, nor any time limited for the payment of the portions, it would (he thought) be extreme hard for the court to decree that which would prove the destruction of the estate, against the intention of the party.

[From which decree, so far as is related to the raising the daughters' portions, there was an appeal to the House of Lords, but on May 2, 1733, the parties on both sides came to an agreement, 6 Bro. Parl. Cas. 114, which agreement was G confirmed by Act of Parliament.]

A

STREATFIELD *v.* STREATFIELD

[Lord Chancellor's Court (Lord Talbot of Hensol, L.C.), Hilary Term, 1735]

[Reported Cas. temp. Talb. 176; 1 Swan. 436, n.; 25 E.R. 724]

B *Equity—Election—Infant—Land settled by marriage articles and later devised—Election by devisee whether to take under articles or will.*

A testator by articles previous to his marriage agreed to settle certain lands to the use of himself and his intended wife, remainder to the issue of the marriage. He had a son and two daughters and upon the marriage of the son he settled other lands in consideration of the marriage. He also levied a fine of the former lands to the use of himself in fee, and then made his will, devising part of the former lands to his two daughters and the rest of his real estate to trustees to the use of his grandson for life with usual remainders, directing the trustees out of the profits to educate the grandson and to place out the rest of the profits to be paid to the grandson at twenty-one years of age, and, if he did not attain that age, this fund was to be paid to his daughters.

C

D

Held: the grandson, an infant, must make his election whether he would take under the will or the articles; if he elected to take under the articles so much of the land devised to him as amounted to the value of the land comprised in the articles must be conveyed to the testator's daughters.

E **Notes.** Applied: *Whistler* v. *Webster* (1794), 2 Ves. 367; *Cooper* v. *Cooper*, [1874–80] All E.R.Rep. 307; *Re Vardon's Trusts* (1884), 28 Ch.D. 124. Considered: *Re Hancock*, *Hancock* v. *Pawson*, [1905] 1 Ch. 16. Referred to: *Boughton* v. *Boughton* (1750), 2 Ves. Sen. 12; *Frank* v. *Standish* (1772), 15 Ves. 391, n.; *Finch* v. *Finch* (1792), 1 Ves. 534; *Broome* v. *Monck*, [1803–13] All E.R.Rep. 631; *Thellusson* v. *Woodford* (1806), 13 Ves. 209; *Re Chesham*, *Cavendish* v. *Dacre* (1886), 31 Ch.D. 466; *Re Dicey*, *Julian* v. *Dicey* [1956] 3 All E.R. 696.

F

As to the equitable doctrine of election in the case of an infant, see 14 Halsbury's Laws (3rd Edn.) 598; and for cases see 20 Digest (Repl.) 469-471.

Cases referred to:

(1) *Trevor* v. *Trevor* (1719), 1 Eq. Cas. Abr. 387, pl. 7; 1 P.Wms. 622; affirmed, 5 Bro. Parl. Cas. 122; 9 Mod. Rep. 161, H.L.; 40 Digest (Repl.) 520, *314.*

G

(2) *Lechmere* v. *Lady Lechmere* (1735), Cas. temp. Talb. 80 2 Eq. Cas. Abr. 31, 501; 25 E.R. 673; sub nom. *Lechmere* v. *Earl of Carlisle*, 3 P.Wms. 211, L.C.; 20 Digest (Repl.) 356, *824.*

(3) *Pinnel's Case* (1602), 5 Co. Rep. 117a; 77 E.R. 237; sub nom. *Penny* v. *Core*, Moore, K.B. 677; 12 Digest (Repl.) 516, *3863.*

H (4) *Rose* v. *Bartlett* (1633), Cro. Car. 292; 79 E.R. 856; 48 Digest (Repl.) 592, *5627.*

(5) *Harwood* v. *Child* (1734), unreported.

(6) *Duffield* v. *Smith* (1692), Freem. Ch. 185; 1 Eq. Cas. Abr. 204; 2 Vern. 258; cited 11 Mod. Rep. App. 332; 22 E.R. 1150; reversed sub nom. *Smith* v. *Driffield*, 15 Lords Journals, 158, H.L.; 20 Digest (Repl.) 4911, *2002.*

I (7) *Noyes* v. *Mordant* (1706), Gilb. Ch. 2; 25 E.R. 2; sub nom. *Noys* v. *Mordaunt*, 2 Vern. 581; Prec. Ch. 265; 20 Digest (Repl.) 456, *1677.*

(8) *Lady Herne* v. *Herne* (1706), 2 Vern. 555; 1 Eq. Cas. Abr. 203; 23 E.R. 959, L.C.; 20 Digest (Repl.) 518, *2275.*

(9) *Cowper* v. *Cotton* (1731), unreported.

(10) *West* v. *Errissey* (1727), 2 P.Wms. 349; 1 Bro. Parl. Cas. 225; 1 Com. 412; 24 E.R. 760, H.L.; 40 Digest (Repl.) 521, *321.*

Bill to decide question in administration of estate.

Thomas Streatfield, the plaintiff's grandfather, by articles previous to his marriage, on May 31, 1677, agreed to settle lands in Sevenoaks to the use of himself and Martha his intended wife, for their lives and the life of the survivor, and after the survivor's decease to the use of the heirs of the body of him the said Thomas on his wife begotten with other remainders over. The marriage soon after took place, and by deed dated April 5, 1698, reciting the articles, he settled his lands at Sevenoaks to the use of himself and his wife for their lives and the life of the survivor (without impeachment of waste during the life of Thomas) and after their decease to the use of the heirs of the body of the said Thomas on the said Martha to be begotten, and for want of such issue remainder to the right heirs of Thomas. They had issue Thomas (their only son) and two daughters, Margaret and Martha. In 1716, upon the marriage of Thomas the son, the testator settled other lands (of which he was seised in fee) of the yearly value of £355 to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise £2,000 for younger children. On the son's death, Thomas the father, in 1723, levied a fine of the lands comprised in the deed of 1698 to the use of himself in fee, and in 1725 made his will, thereby devising part of those lands to his two daughters Margaret and Martha,

> "And also all other his manors, messuages, lands, tenements and hereditaments whatsoever, either in possession, reversion or remainder not thereinbefore given or disposed of, situate in the counties of Kent, Surrey, or elsewhere, to trustees, in trust for the plaintiff Thomas his grandson for life, remainder to his first and other sons in tail male, remainder to his daughters in tail, remainder to Margaret and Martha, with several remainders over. And my will and meaning further is, and I do hereby authorise and appoint the trustees and the survivor of them to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend for the education of my grandson Thomas so much as they shall think fit during his minority, and that the trustees shall place out at interest such moneys arising out of the rents and profits of the said estates, which said moneys, with interest arising therefrom, my will is, be paid to my grandson Thomas at his age of twenty-one years, if he so long live, or, in case he dies before that age, then that the same shall be paid to my two daughters Margaret and Martha, their executors, etc."

The testator died in 1730.

The question was whether the settlement in 1698 was a proper execution of the articles of 1677, and, if not, whether the general devise to the plaintiff should be taken as a satisfaction for what he was entitled to under the articles of 1677.

Dudley Ryder, *Brown*, *Fazakerley* and *Noel*, for the plaintiff, argued that, although in a will or articles executed Thomas the grandfather would have been tenant in tail, yet the articles of 1677 being but executory, the court would interpose by carrying them into execution in the strictest manner, and not leaving it in his power to destroy the uses as soon as raised. According to that rule the deed of 1698 was certainly no execution of the articles in equity, for, though it was in the very words, yet it did not answer the intent of the articles and came, therefore, within the rules of *Trevor* v. *Trevor* (1), (1 Eq. Cas. Abr. 387). The settlement in 1716 upon Thomas the son's marriage (although it was of lands of greater value than those contained in the articles) could never be thought a satisfaction for them, there being no reference at all in it to the articles and it being made only in consideration of the son's marriage, for settling a jointure upon his wife, and making a competent provision for the issue, all which were new considerations in no way relative to the articles. Where there was an express consideration mentioned in a deed, there could be no averment of another not contained therein. That nothing could be taken for a satisfaction but what was in its nature agreeable to the thing which was to be done, was held in *Lechmere* v. *Lady Lechmere* (2). In this case Thomas the son was by the articles to have been tenant in tail, but by the settlement of 1716 he was to be but tenant for life, which was giving him

a less estate for a greater, and, consequently, the settlement cannot be deemed a satisfaction without a special acceptance of it as such, according to the rule in *Pinnel's Case* (3), where it was held that payment of a lesser sum could never be a satisfaction for a greater unless upon a special circumstance showing the intent, as payment at an earlier day, etc. The will can no more be taken for a satisfaction than the settlement, and for the same reasons, for, by it the plaintiff is no more than tenant for life, and even that not absolutely, the profits being directed by the testator to be accumulated until the plaintiff attains his age of twenty-one, and then to be paid to him, but, if he dies before that age, they are given to the testator's daughters. When he does arrive at that age he is to be but barely a tenant for life, and even not that without impeachment of waste. Besides, if the will be construed as a satisfaction against the plaintiff, so it must likewise be as to all the others claiming under the articles, whereas the plaintiff's sisters, who were entitled under the articles, can never take anything under this will, but are wholly excluded. The general devise of all the testator's manors, lands, etc., in possession, reversion or remainder, will not alter the case, for where the testator has estate sufficient to satisfy such general words he shall never be construed to have intended to pass that which he had no right to dispose of and the giving of which would work a wrong. That he had no right to dispose of the lands contained in the articles is evident from what has been already said. Had not this been upon his own marriage, but in any other settlement, he would have been a trustee for his son, and if he had then made his will in the same words that he has done here, surely that trust estate would never have passed. There is no difference whether the trust be expressed, or whether it arises by implication of equity. It would be an absurdity to construe these words to pass away a third person's estate. A grant of all one's goods will not pass those which he has in autre droit. So, if he had had a mortgage in fee, such general words would not have passed it from the devisee of the personal estate to the devisee of the land. In *Rose* v. *Bartlett* (4) a general devise of "all his lands and tenements," having both freehold and leasehold, was held to pass the freehold lands only. In *Harwood* v. *Child* (5), heard by Lord Talbot, L.C., on Mar. 18, 1734, a devise of all his lands for payment of debts, having both freehold and copyhold, but no surrender made of the copyhold to the use of his will, was held not to pass the copyhold. Nor can *Duffield* v. *Smith* (6) and *Noys* v. *Mordaunt* (7) be objected, for, in the former case the decree was reversed on account of the sister's being heir-at-law and disinherited—which is the present case, for here they would take a beneficial interest from the plaintiff who was heir-at-law to his grandfather and give him but a very small one in its place, and in the latter case, the father being tenant in tail of part, had power to bar it by fine, in which respect he might well be looked upon as a proprietor of the whole. If the plaintiff be decreed to make his election, it must be done presently, for then it is that he is to take whereas he cannot by law make his election, being but an infant. The court cannot compel him to that which the law disables him from doing.

John Willes, *Strange* and *Peer Williams*, for the defendant, said that the court would not in all cases decree a specific performance, but would in some cases leave the party to his remedy at law upon the covenant. The articles were made so long ago as in 1677, and Thomas the son, who was the person entitled to have them carried into execution, lived until 1722. Whoever came to equity must do equity, and, therefore, if the plaintiff would take advantage of those articles, he must make a compensation for it out of the will, which gave him an estate plainly on the basis that he would take nothing by the articles, but would never be at liberty to take a great benefit under the will and waive that part which made against him, to the prejudice of a third person. The whole will must be acquiesced under, or no part of it at all, according to the resolution in *Noys* v. *Mordaunt* (7) which went upon the reason of an entire compliance with the testator's intent in taking entirely under the will, and not upon the supposed reason of his being proprietor by having

it in his power to levy a fine. The like resolution was in *Lady Herne* v. *Herne* (8), and in *Cowper* v. *Cotton* (9), Feb. 16, 1731, at the Rolls, where a freeman of London devised his estate to trustees for the raising £6,000 for his four daughters, and made a disposition of the surplus. It was held that they should stand either by the will or by the custom, and, if by the former, that they should not defeat the devise over. In cases where general words in a will had been restrained from passing all which the testator had, it was upon the testator's intention manifestly appearing in the will itself not to pass so much as the generality of his words would comprehend, but in the present case his intent plainly appeared to pass all. Nor will that intent be satisfied by saying that he had a reversion of the lands comprised in the articles since he would have been tenant in tail under the articles and only for life under the will.

LORD TALBOT of HENSOL, L.C.—It cannot be doubted, but that upon application to this court for the carrying into execution the articles of 1677 the court would have decreed it to be done in the strictest manner and would never leave it in the husband's power to defeat and annul everything he had been doing, and the nature of the provision is strong enough for this purpose without any express words. I must, therefore, consider what was the operation of the deed of 1698, which is declared to be in performance of the true intent and meaning of the articles. If it be so, all is well, but if it be not, it only shows that the parties intended it so, but were mistaken. So was *West* v. *Errissey* (10), where the articles were by the House of Lords decreed to be made good, and the same must be done in this case if nothing intervenes to prevent it. The settlement in 1716 whereby the grandfather settled other lands upon his son's marriage has been called a satisfaction for those articles, but to me it appears neither an actual satisfaction nor to have been intended as such. In 1698 the grandfather had done that which he apprehended to be a satisfaction for the articles, but this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration entirely new and the limitations being entirely different. Therefore, it would be absurd to call this a satisfaction for another thing with which it has nothing to do and to which it is no way relative.

The next thing to be considered is the fine levied of the lands in question in the year 1723 by the grandfather, the intent whereof was to have the absolute ownership of those lands in him, and one reason why no application has been made till now to have those articles carried into execution, might be that during the grandfather's life nobody was entitled to anything in possession under them. Then comes the will in 1725 whereby he gives part of those lands settled in 1698 to his daughters, thereby showing his apprehension to be that by a fine he had given himself a power of disposing of them, and it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles.

The next thing is the devise to the trustees for his grandson, the plaintiff, upon his attaining the age of twenty-one, and the question here is whether the general words shall ever pass lands not capable of the limitation in the will. As to that *Rose* v. *Bartlett* (4) and other cases have been cited, but they cannot influence the present case, for the testator had legally a power to dispose of those lands, and, though they might be affected with a trust in equity, yet that cannot be supposed to lie in his conusance, he having done an act to enable himself to dispose of these lands. It differs from the case that was put of an express trust, and the trustee devises all his lands, for there the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes this testator's intent clear is that he has devised part of these lands to his daughters, and he must have looked upon himself as master of the one part as well as the other. I, therefore, think his intent was clear to pass these lands by the will, and, if so, we must now consider what will be the effect of this will. If the plaintiff has a lien upon the lands

of the articles, then he may stand to them if he pleases, but when a man takes upon himself to devise what he had no power over on a supposition that his will will be acquiesced under, this court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it, as was done in *Noys* v. *Mordaunt* (7), where A., having two daughters B. and C. devised fee simple lands to B. and lands which were settled upon him in tail to C. It was held that, if B. would claim a share of the entailed lands under the settlement, she must quit the fee simple lands, for, the testator having disposed of his whole estate among his children, what he gave them was upon an implied condition that they should release to each other, there being a tacit condition annexed to all devises of this nature that the devisee does not disturb the disposition which the devisor has made. So are the several cases that have been decreed upon the custom of London.

The only difficulty in the present case is that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one, and, if after, then but an estate for life. He appears before the court in the favourable light of being heir-at-law, but this will not alter the case. The estates which the testator has given him were undoubtedly in his power. He has given them to trustees until his grandson attains twenty-one and has disposed of them in such a manner as that there can never be any undisposed residue to go to the plaintiff as heir-at-law, and surely it is as much in the power of the court to make this bequest, thus limited, to be a satisfaction if the party will stand to the will as in the other cases. Indeed, if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles, but that is because nothing is left them by the will, and they cannot be said to be quite destitute of provision since it is just and reasonable that they should be maintained by their mother, who is entitled to a large and ample provision by her marriage settlement. Nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger children, for, if the plaintiff dies before twenty-one, then all the profits already received are to go to his aunts, and so by that construction I must take the maintenance out of their estate and oblige them to contribute to the maintenance of distant relations, viz., nieces, at the same time that the mother (who has an ample provision) would be left at large, and under no tie of maintaining her own children.

[It was decreed that the plaintiff should have six months after he came of age to make his election whether he would stand to the will or the articles. If he made his election to stand to the latter, then so much of the lands devised to him as would amount to the value of the lands comprised in the articles and were devised to Margaret and Martha to be conveyed to them in fee.]

PULLEN *v.* READY

[Lord Chancellor's Court (Lord Hardwicke, L.C.), January 8, 1743]

[Reported 2 Atk. 587; 1 Wils. 21; 26 E.R. 751]

Will—Condition—Marriage—Gift at 21 *or on marriage—Condition of marriage with consent of parents—Vesting of gift at* 21*—Marriage thereafter free of condition.*

Where a testator gave to his two nieces legacies which were to be paid to them on their attaining the age of twenty-one or on marriage, whichever should happen first, provided that they married with the consent of their parents, the gifts to sink into residue on non-fulfilment of the condition,

Held: the legacies vested on the nieces attaining twenty-one, and after that date they could marry without consent free of the condition.

Family Arrangement—Settlement of all disputes—Refusal of court to entertain matters subsequently raised.

After a family arrangement has entirely settled all disputes between the parties and their several rights the hands of the court are so tied up that they will not enter into a question which they might have entertained had there been no such agreement.

Mistake—Mistake of fact—Agreement -Mistake of all parties—Reluctance of court to interfere.

Per Lord Hardwicke, L.C.: There is nothing more mischievous than for this court to decree a forfeiture after an agreement in which, if there is any mistake, it was the mistake of all parties, and no one of them is more under an imposition than the others.

Notes. Considered: *Stockley* v. *Stockley*, [1803–13] All E.R.Rep. 543; *Stewart* v. *Stewart* (1839), 6 Cl. & Fin. 911; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278. Referred to: *Baker* v. *Bradley*, [1843–60) All E.R.Rep. 787.

As to conditions in wills in restraint of marriage, see 39 Halsbury's Laws (3rd Edn.) 918–922. For cases, see 48 Digest (Repl.) 316–323, 352–362.

Cases referred to:

(1) *King* v. *Withers* (1712), Gilb. Ch. 26; Prec. Ch. 348; 1 Eq. Cas. Abr. 112; 25 E.R. 19; 48 Digest (Repl.) 353, *3030*.

(2) *Page* v. *Hayward* (1705), 11 Mod. Rep. 61; 2 Eq. Cas. Abr. 362; Holt, K.B. 618; 2 Salk. 570; 91 E.R. 481; 48 Digest (Repl.) 293, *2592*.

(3) *Cann* v. *Cann* (1721), 1 P.Wms. 723; 24 E.R. 586, L.C.; 35 Digest (Repl.) 101, *50*.

Bill and **Cross-Bill** in administration of estate.

By his will, dated in 1720, the testator, Edward Colston, declared:

"I give to my cousin Mary Edwards £500 to be put out to interest for her separate use; and after her decease I appoint the said principal sum of £500 to be paid to her daughter Sophia at her day of marriage or twenty-one, which shall first happen. I give to her daughter Mary £8,000 and I further give to her sister Sophia £5,000 which said several sums shall be paid to them at their ages of twenty-one or day of marriage which shall first happen provided they marry with the consent of their father and mother or the survivor of them, or otherwise their legacies to sink into my personal estate. It is my will, and I do hereby declare, that if the said Sophia and Mary, daughters of my said niece Mary Edwards, or either of them, shall hereafter marry with any person or persons whatsoever without the consent of their father and mother and the trustees named in my will or the greater number of them living signified under their hands, then it is my will that such of the daughters so marrying

A shall have or receive no more benefit or advantage by my said will or anything therein contained than if they were actually dead or not named in my said will either by particular names or daughters in general."

Mary Edwards had issue three daughters, Sarah, Mary, and Sophia. Sarah married in the lifetime of the testator in a manner disagreeable to him. Mary married B Lord Middleton with such consent as the will required. Sophia, in August, 1732, arrived at the age of twenty-one. On Jan. 19, 1733, by deed enrolled between Thomas Edwards, her father, of the first part, and Sophia, of the second part, a recovery was suffered (Mrs. Mary Edwards being then living) and the uses declared to Thomas Edwards for life, then to the use of such person or persons and for such estate as Sophia should by deed or writing, to be by her duly executed C with the consent of Mr. Edwards during his life, and these failing to the use of Sophia, her heirs and assigns, for ever. In February, 1736, Sophia married without her parents' consent to Mr. Ready, she being then near 26 years of age. Previous to the marriage he settled an annuity out of his own estate of £200 a year and settled her own estate to him and her for their lives and the life of the survivor and to the issue of the marriage. Mr. Edwards, who was one of the executors D and entitled in right of Mary Edwards his wife to a moiety of the testator's estates, neglected to pay Lord Middleton part of his lady's fortune, and a sequestration issued out of the Court of Chancery against him. His estates were sequestered, and he absconded.

On July 9, 1737, in order to make Lord Middleton satisfaction for his demand and to settle the whole family affairs, a draft of articles was prepared and approved E by counsel between Thomas Edwards and Mary his wife, of the first part, Lord Middleton and his lady, of the second part, John Pullen and Sarah his wife, of the third part, and Mr. Ready and Sophia his wife, of the fourth part. In these articles, Lord Middleton's marriage and sequestration was recited, and in order to satisfy Lord Middleton's debt of £10,000 Edwards, Pullen, and Ready, covenanted for themselves and their wives to convey to Lord Middleton certain fee-farm rents F as part of the estate and share of Lady Middleton given by the testator's will, and thereby agreed that within one month after the death of Mrs. Edwards, Pullen and his wife would convey as many lands as were worth £10,000 in like manner to Ready and his wife. It was further agreed that after Mrs. Edwards's death an equal division should be made between the three daughters of Mrs. Edwards, of all the estates belonging to Mrs. Edwards as devisee of Colston. On Sept. 29, 1739, an G indenture was executed between the same parties, wherein the will and settlement of Colston were recited and fines and recoveries suffered.

Sophia received her legacies of £5,000 and she and her husband applied to Lord Middleton and Mr. Pullen and his wife to have a division of the estate pursuant to the will and articles. Lord and Lady Middleton were willing to do their part. Mr. Pullen and Sarah his wife, who had married very meanly a second time, H objected that Sophia by marrying without consent had forfeited her right in the third of what should come to her upon the death of her mother. The three sisters were co-heirs to the testator. Mr. Ready by his answer to Mr. Pullen's bill, put in issue the articles and contended upon them more at large by his cross-bill.

LORD HARDWICKE, L.C.—There are two questions in these causes. First, I as to the £500 legacy. Secondly, as to the clause and condition in Colston's will by which the plaintiffs in the original bill insist on a moiety on account of Mrs. Ready's forfeiture.

As to the first question there is nothing in it; it has been determined over and over. The usufructuary benefit is given to the mother for life only. This case is like *King* v. *Withers* (1), and several other cases since. Marriage with consent of father and mother is always construed now so as to relate to the time of the legacies vesting. If the party arrives at the age of twenty-one, it vests, and the marrying without consent afterwards is of no consequence.

The second question is more difficult and depends upon the limitations in Colston's will as to the real estate in possession and the money which is directed to be laid out in land given to Mrs. Edwards for life. [The second clause in Colston's will set out above], as to the legacy of £500 and the £5,000 if it is taken to extend to them, the clause being very general and having no devise over attending upon it, must be considered only in terrorem, and, therefore, no forfeiture ensues, and this may be laid out of the case. I must consider it then with regard to the real estate. To be sure the ecclesiastical court have no jurisdiction here, nor has it ever been applied to conditions annexed to real estate. There might, perhaps, be some doubt as to the money, but as this court considers money directed to be laid out in land as land, this is likewise exempt from the ecclesiastical law.

One question has been started, what would be the consequence of this forfeiture with regard to the real estate and who can claim the benefit of it. It has been argued by counsel for Mr. Pullen that here is something in the nature of a cross-remainder. If it rests only in the intention of the testator, that is by no means sufficient, for if a man devises to daughters as tenants in common and there is no express devise over to the others upon one of them dying or not performing a condition the share of such daughter would descend upon the heir-at-law of the testator. The clause is thus worded, that a daughter

> "so marrying shall have or receive no more benefit or advantage by my said will or anything therein contained than if she was actually dead."

The consequence of this is that it will go, as the law would have said, to the right heirs of Mr. Colston.

After Sophia Edwards, now Ready, arrived at the age of twenty-one, she joined with her father in suffering a recovery and declaring the uses of her share. The general notion of a common recovery is that it bars estates tail, remainders over, and extinguishes all conditions and powers and all incidents annexed to an estate tail. Indeed, as has been said in argument, it will not bar a mortgage because that is to be considered as a charge upon the estate and cannot be defeated, but the force of a conveyance by common recovery to extinguish all these powers arises hence, that the law considers it is in the nature of a real action and the recoveror is in by right. See *Page* v. *Hayward* (2) in PIGOTT ON COMMON RECOVERIES 170, and 2 SALK. 570, which is in point. Therefore, all that was in possession at the time is out of the question and the condition as to that is barred. As to the money not yet laid out in land, the articles of July 9, 1737, have likewise barred any right that might have accrued from the forfeiture to the other two sisters upon Mrs. Ready's marrying without consent. At the time of the execution of the articles, it could not but be known that Mr. and Mrs. Ready married without consent, because Mr. and Mrs. Edwards, Lord and Lady Middleton, Mr. and Mrs. Pullen were all parties and cannot possibly be supposed to be ignorant of this fact which had happened some years before. It is said they might know the fact and yet not know the consequence in law, but if parties are entering into an agreement and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with consequence of law as to this point, and shall not be relieved under a pretence of being surprised with such strong circumstances attending it. Besides, here is a departure from the will, for the articles are plainly different, being a conveyance to Pullen and his heirs, instead of an estate tail given under the will. So, with the knowledge of the will, and all the clauses in it, the condition annexed, and the forfeiture, the parties with their eyes open execute this deed.

It has been said, chiefly by Mr. Pullen's counsel, that they executed the articles under a mistake. There is nothing more mischievous than for this court to decree a forfeiture after an agreement in which, if there is any mistake, it was the mistake of all the parties to the articles, and no one of them is more under an imposition than the others. This court is so far from assisting to set up the forfeiture

again that they would rather rejoice at the agreement, because it has absolutely tied up the hands of the court from meddling in the question. If I was to decree the forfeiture now, it would be making all agreements vain and nugatory. The case that comes nearest to the present is *Cann* v. *Cann* (3), before LORD MACCLESFIELD.

I must decree, therefore, that Pullen's bill be dismissed without costs so far as it seeks any relief with regard to the forfeiture, and under Mr. Ready's cross-bill, I shall direct the articles to be specifically performed, and to be carried into execution.

CONSTABLE'S CASE

[COURT OF QUEEN'S BENCH (Popham, C.J., and other judges), Easter Term, 1601]

[Reported 5 Co. Rep. 106a; 77 E.R. 218]

Shipping—Wreck—Goods cast on land by sea—Flotsam—Jetsam—Ligan—Ownership—Jurisdiction of Court of Admiralty.

Nothing shall be said to be wreccum maris but such goods only which are cast or left on the land by the sea, for wreccum maris significat illa bona quae naufragio ad terram appelluntur. Flotsam is when a ship is sunk, or otherwise perished, and the goods float on the sea. Jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea. Ligan is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again. None of these goods which are called flotsam, jetsam, or ligan, is called wreck so long as they remain in or on the sea, but if any of them by the sea be put on the land, then they shall be said to be wreck and pass by a grant of wreck.

Although the Court of Admiralty does not by the Admiralty Jurisdiction Act, 1391, have jurisdiction over wreck of the sea because it is cast on the land, it does have jurisdiction over flotsam, jetsam and ligan, for they are all on the sea.

The Crown should have flotsam, jetsam and ligan when the ship perishes, or when the owner of the goods is not known. A man may have flotsam and jetsam by a royal grant and may have flotsam within the high-water and low-water mark by prescription. Wreck may be claimed by prescription.

Sea—Foreshore—Land between high- and low-water marks—Property of subject—Jurisdiction of Admiral on flow of tide.

The soil between high-water and low-water mark may be parcel of the manor of a subject, yet when the sea flows and has plenitudinem maris, the Admiral should have jurisdiction of everything done on the water between the high-water and low-water mark by the ordinary and natural course of the sea. But when the sea ebbs, the land may belong to the subject, and everything done on the land when the sea is ebbed shall be tried at the common law. So, that below low-water mark the Admiral has sole jurisdiction; between high- and low-water mark the common law and the Admiral have jurisdiction interchangeably.

Time—Computation—Wreck—Seizure of goods—Year and a day.

In many cases concerning time the common law gives a year and a day for

a convenient time. In the case of wreck the year and a day shall be accounted from the seizure of the goods as wreck. If a commission to inquire of wreck be awarded, or action brought within the year and a day, although the verdict be given afterwards, it is sufficient.

Notes. The Merchant Shipping Act, 1884, s. 510 (23 HALSBURY'S STATUTES (2nd Edn.) 660) defines wreck to include jetsam, flotsam, ligan and derelict found in or on the shores of the sea or any tidal river. The Sea Fisheries Act, 1883, s. 10, Sched. I, art. 25 (10 HALSBURY'S STATUTES (2nd Edn.) 203), provides that things specified in art. 25 of Sched. I shall be deemed wreck. The Civil Aviation Act, 1949, s. 5 (28 HALSBURY'S STATUTES (2nd Edn.) 244) provides for the application of the law of wreck to aviation. The Admiralty jurisdiction of the High Court is provided by s. 1 of the Administration of Justice Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 3).

Distinguished: *Prideaux* v. *Warne* (1673), Freem.K.B. 355. Considered: *Dunwich Corpn.* v. *Sterry* (1830), 1 B. & Ad. 831; *R.* v. *Wood* (1849), 3 Cox, C.C. 453; *The Schiller* (1877), 2 P.D. 145. Referred to: *Admiralty Case* (1609), 13 Co. Rep. 51; *R. and Waller* v. *Hanger* (1615), 3 Bulot. 1; *R.* v. *Forty-nine Casks of Brandy* (1836), 3 Hag. Adm. 257; *R.* v. *Two Casks of Tallow* (1837), 3 Hag. Adm. 294; *R.* v. *Great Western Rail. Co.* (1842), 3 Q.B.D. 333; *R.* v. *Thurborn* (1848), 2 Car. & Kir. 831; *Duke of Beaufort* v. *Swansea Corpn.* (1849), 3 Exch. 413; *Baldwin* v. *Elphinstone* (1775), 2 Wm. Bl. 1037; *The Gas Float Whitton* (*No. 2*), [1896] P. 42; *The Olympic*, [1911–13] All E.R.Rep. 469.

As to droits of Admiralty, unclaimed, see 1 HALSBURY'S LAWS (3rd Edn.) 68; and for cases, see 1 DIGEST (Repl.) 114, 182. As to boundaries fixed by legal presumption, see 3 HALSBURY'S LAWS (3rd Edn.) 364; and for cases, see 47 DIGEST (Repl.) 731 et seq. As to extent of Crown to wreck, see 7 HALSBURY'S LAWS (3rd Edn.) 537 et seq.; and for cases, see 11 DIGEST (Repl.) 671 et seq. As to the meaning of wreck, see 35 HALSBURY'S LAWS (3rd Edn.) 721 et seq.; and for cases, see 42 DIGEST (Repl.) 957 et seq. As to period in which an act must be done, year and a day, see 37 HALSBURY'S LAWS (3rd Edn.) 95 et seq.; and for cases, see 45 DIGEST (Repl.) 256 et seq. As to foreshore, see 39 HALSBURY'S LAWS (3rd Edn.) 557 et seq.; and for cases, see 47 DIGEST (Repl.) 702 et seq.

Case referred to:

(1) *Lacy's Case* (1583), cited in 2 Co. Rep. 93a; sub nom. *Lacyes Case*, 1 Leon. 270.

Action for Trespass against the defendant for taking certain goods, twelve shirts and five cloaks, which the plaintiff claimed were wreck cast on land within his manor of Barnston.

The question arose as to what constituted wreck as opposed to flotsam, jetsam, or ligan, and the consequent ownership.

The plaintiff, Sir Henry Constable, brought an action of trespass against the defendant, Gamble, and declared that King Philip and Queen Mary were seised of the manor of Holderness in the county of York in their demesne as of fee, as in right of the Crown of England; and by their letters patent granted the manor and fee, with wreck of the sea within the manor and fee, to Henry Earl of Westmorland in fee, who conveyed them to Sir John Constable, father of the plaintiff, whose heir he is, in fee. Further, that certain goods, i.e., twelve shirts and five cloaks were wreck and cast on the land within the manor of Barnston, which is within the fee of Holderness, and that the defendant took the goods, etc. The defendant pleaded to issue, and thereupon a special verdict was found to the effect that the conveyance to the plaintiff of the manor and fee aforesaid was true as declared; and that the manor of Barnston was within the fee. Further that parcel of the goods were wreck, and cast super arenas aqua falsa minime coopertas manerii de Barneston infra fluxum et refluxum maris in manerio de Barneston, and as to the other parcel of goods, that they were floating super aquas maris refluentes ex arenis ejusd' manerii de Barneston infra fluxum et refluxum maris, etc. And the

defendant took all the goods and seized them to the use of the Lord Admiral, etc. The jury assessed damages entirely for all.

The Court gave judgment against the plaintiffs; and resolved the following five points.

(1) That nothing shall be said wreccum maris, but such goods only which are cast or left on the land by the sea, for wreccum maris significat illa bona quae naufragio ad terram appelluntur. Flotsam is when a ship is sunk, or otherwise perished, and the goods float on the sea. Jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards notwithstanding the ship perishes. Lagan (vel potius ligan) is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again, et dicitur lig. a ligando. None of these goods which are called jetsam, flotsam or ligan, is called wreck so long as they remain in or on the sea, but if any of them by the sea be put upon the land, then they shall be said to be wreck. So flotsam, jetsam or ligan, being cast on the land pass by the grant of wreck: and where it is provided by the statute of 15 Ric. 2, c. 3 [Admiralty Jurisdiction Act, 1391, which defines the original jurisdiction of the Court of Admiralty] that the Court of Admiralty shall not have cognisance or jurisdiction of wreck of the sea, yet it shall have cognisance and jurisdiction of flotsam, jetsam and ligan; for wreck of sea is when the goods are by the sea cast on the land, and so infra comitat', whereof the common law takes cognisance, but the other three are all on the sea, and, therefore, of them the Admiral has jurisdiction. Bracton, lib. 3, c. 3, fol. 120: "Item magis proprie dici poterit wreccum, si navis frangatur, et ex quâ nullus vivus evaserit, et maximè si domin' rerum submersus fuerit, et quicquid inde ad terram" (note these words) "venit, erit domini Regis." That also appears by the Book of Entries, fol. 611, 612, Trespass in Wreck. When wreck is claimed by prescription (as by law it may be) the pleading is always bona wreccata super mare, et ad terram project'. Another prescription is there habere omnimod' wreccum maris infra præcinctum manerii, sive dominii præd' project', et flotsam maris infra eund' præcinct' devenient'; by which the difference between wreck and flotsam appears: vide 9 Edw. 4, 22. Wreck is when it is cast on the land: 11 Hen. 4, 16; 5 Edw. 3, 3 and 29; 21 Hen. 6; Prescript.; 14 Edw. 2, in Trespass 236; 5 Hen. 7, 36; (35) 39 Hen. 6, 37 and 9 Hen. 7, 20, acc'. Vide Regist. int' brevia de transgress. 102 b. The writ says [see Fitzherbert's Natura Brevium 91 D]: "Ostensurus quare cum idem Tho. dominus manerii, de Estombavent existat et ibidem habere debeat, ipseque et antecessores sui domini manerii præd' a tempore quo, etc., non existat memoria, hucusque habere consueverunt wrecc' maris infra præcinct' maner' præd', præd' Joceus et Robert. bona et catalla ad valenc' cent' solid. apud S. infra præcinct' ejusd' manerii ad terram project' et quæ ad ipsum Tho. tanquam wreccum pertinere deberent, vi et armis ceperunt et asportaverunt." The Admiralty Jurisdiction Act, 1391, proves it also, where it is enacted and declared that wreck of the sea shall be tried and determined by the laws of the land, which cannot be extended to flotsam, jetsam or ligan, for they are in or on the sea, and, therefore, cannot be tried and determined by the common law (for there trial fails), but are to be determined before the Admiral.

(2) In this case it was resolved by the whole court that the soil on which the sea flows and ebbs, sc. between the high-water mark and low-water mark, may be parcel of the manor of a subject: 3 Dyer, 326 b, pl. 2). So it was adjudged in *Lacy's Case* (1), Trin. 25 Eliz. in this court. Yet it was resolved that when the sea flows, and has plenitudinem maris, the Admiral shall have jurisdiction of everything done on the water, between the high-water mark and low-water mark, by the ordinary and natural course of the sea: and so it was adjudged in *Lacy's Case* (1), that the felony committed on the sea ad plenitud' maris, between the high-water mark and the low-water mark, by the ordinary and natural course of the sea,

the Admiral should have jurisdiction of; and yet when the sea ebbs, the land may belong to a subject, and everything done on the land when the sea is ebbed shall be tried at the common law, for it is then parcel of the county, and infra corp' comitat', and therewith agrees Y.B. 8 Edw. 4, 19 A. So note, that below the low-water mark the Admiral has the sole and absolute jurisdiction; between the high-water mark and low-water mark, the common law and the Admiral have divisum imperium, interchangeably, as is aforesaid, sc. one super aquam, and the other super terram. Sir John Popham, C.J., said, that on a trial at nisi prius between the city of Bristol and the Lord Berkeley, it was held by the justices of assize, that where Lord Berkeley had a manor adjoining the Severn, and prescribed to have wreck within his manor, and certain goods floated between the high-water mark and low water, and the city of Bristol had flotsam there; that the said goods were not wreck as long as they were floating upon the water between the high-water mark and low-water mark. See Y.B. 5 Edw. 3, fo. 3, pl. 11, in a replevin brought by William de Newport of London against Sir Henry Nevell, and declared that the defendant took three lasts of herrings, and a ship. The defendant pleaded that he was lord of the manor of Walring, and prescribed to have wreck within his manor a tempore cujus, etc., and that the herrings and ship were wreck within his manor. To which the plaintiff said that they were our goods in the keep of our mariners which arrived by the sea, and we say that he took them out of their custody: judgment if he can claim as wreck. To which the defendant said, that we took them as wreck, out of all custody. On which book I observe three things: (i) that wreck may be claimed by prescription; (ii) that forasmuch as a ship cannot be wreck, sc. cast on the land, but between the high-water and low-water mark, thence it follows that that was parcel of the manor; (iii) if the ship perishes, yet if any of the servants escape, the law says that they have the custody of the goods, and they are not wreck. Year Book 39 Edw. 3, 35 A. B.: one prescribed to have royal fish, as porpes, etc., found within his manor, which seems to be between the high-water and low-water mark.

(3) It was resolved that the King should have flotsam, jetsam and ligan when the ship perishes, or when the owner of the goods is not known, for in Y.B. 46 Edw. 3, 15, it appears that goods cast into the sea for fear of tempest are not forfeited: vide Fitzherbert's Natura Brevium 112 Co.; 5 Edw. 3, 33; 9 Edw. 4, 22, that the ship ought to perish, which is called shipwreck. That is also proved by the Statute of Westminster the First, c. 4 (Wreck) (1275) [repealed by S.L.R. 1863] where it is said that if a man, dog, or cat escape alive (which is to be intended when the ship perishes), and therewith agrees Bracton lib. 2, c. 18, fol. 41: "Item sine traditione res habita pro derelict', ubi dominus statim desinit esse dom', si autem causa navis alleviandæ, non sic, quia non eâ voluntate ejecit quis, ut desinat esse dom', etc." A man may have flotsam and jetsam by the King's grant, and may have flotsam within the high-water and low-water mark by prescription, as appears before. Those of the west country prescribe to have wreck in the sea so far as they may see a Humber barrel.

(4) It was resolved that the Statute of Westminster the First, c. 4 (Wreck) (1275) by which it is enacted that of wreck of the sea it is agreed, that where a man, a dog, or a cat, escape alive out of a ship, that such ship, nor barge, nor anything within them shall be adjudged wreck, but the goods shall be saved and kept by view of the sheriff, coroner, or King's bailiff, so that if any sue for those goods, and after can prove that they were his, or perished in his keeping within a year and a day, they shall be restored to him without delay, etc., was but a declaration of the common law; and, therefore, all that which is provided as to wreck, extends also to flotsam, jetsam and ligan. Bracton who wrote in the time of Henry III before the making of the statute, speaking of wreck says: "et quod hujusm' dici debet wreccum, verum est, nisi sit, quod verus dom' aliunde veniens et certa indicia et signa donaverit res esse suas, ut si canis vivus inveniat', et constare poterit, quod talis sit dom' illius canis præsumptive, ex hoc illum esse dom' illius canis et illarum rerum; eodem modo si certa signa imposita fuerint

A mercibus." By which it appears that the Statute of Westminster the First which was made in 1275 was but a declaration of the common law against the opinion in Doctor and Student, lib. 2, fo. 118, and if the owner dies, his executors or administrators may make their proofs.

In many cases concerning time, the common law gives a year and a day for a convenient time; as in the case of a stray, if the owner (proclamation being made) B does not claim it within a year and a day, it is forfeited. So a year and day is given in case of appeal, and in a case of descent after entry or claim; of non-claim on a fine, or writ of right at the common law; of a villain dwelling in ancient demesne; of the death of a man who has a blow or wound; of protections, essoins of the King's service, and in many other cases: and the year and day in case of wreck, shall be accounted from the taking or seizure of them as wreck; for although C the property is in law vested in the lord before seizure, yet until the lord seizes, and takes it into his actual possession it is not notorious who claims the wreck, nor to whom the owner shall repair to make his claim, and to show to him his proofs. If the wreck belongs to the King the party may have a commission to hear and determine the truth of it, and that by the verdict of twelve honourable men, for no proof is allowable by law, but the verdict of twelve men: and if it D belongs to other than the King, then if the owner cannot satisfy him who claims them as wreck by his mark or cocket, or by the Book of Customes, or by testimony of honest men, then the owner may have such commission or bring his action at the common law, and prove it by the verdict of a jury. If the commission be awarded, or the action be brought within the year and day, although the verdict be given for him afterwards, it is sufficient: vide Register and Fitzherbert's E Natura Brevium 12. For the commission vide the Statute of Westminster the First, c. 4; 4 Edw. 1 (Office of Coroner) (1276); the Admiralty Jurisdiction Act, 1391; 27 Edw. 3, c. 13; Britton, c. 17; 33 Staunford Prærog. Regis. Note that the Act de Prerogativa Regis (temp. incert.) 17 Edw. 2, c. 11 (1324) enacts, Quod Rex habet wreccum maris per totum regnum, etc., is but a declaration and an affirmation of the common law. For notwithstanding that statute being made F within time of memory, a man may prescribe to have wreck, as appears in 11 Hen. 4, 16; Staunford 38; Fitzherbert's Natura Brevium 91 D.; 5 Hen. 7, 36; 5 Edw. 3, 3 and 59; 9 Edw. 4, 12.

(5) It was resolved in the case at Bar, that part of the goods passed by the name of wreck, and part of the goods were flotsam and did not pass by the grant of wreck, and damages were entirely assessed for all. And in trespass the plain-G tiff shall recover damages only for the value of the goods; wherefore here judgment was given against the plaintiff.

In a note to his report of this case Sir Edward Coke said: At first the common law gave as well wreck, jetsam, flotsam, and ligan upon the sea, as estray (which Bracton calls animalia vagantia, or as others call them animalia vacantia, quia domino vacari debent), treasure-trove, and the like to the King, because by the H rule of the common law, when no man can claim property in any goods, the King shall have them by his prerogative. Therefore, Bracton, lib. 3, cap. 3, says: "Sunt alia quædam quæ in nullius bonis esse dicunt', sicut wreccum maris grossus piscis, sicut sturgio, et balæna, et aliæ res quæ dominum non habent, sicut animalia vagantia, quæ sunt dom. Regis propter privilegium." So that it appears by Bracton that the King shall have wreck, as he shall have great fish, etc., because I they are nullius in bonis, or as he shall have animalia vagantia, sive vacantia, scil. estrays, because none claims the property. Note, that wreck is estray on the sea coming to land, as estray of beasts is on the land coming within any privileged place; and the law gives in both cases a year and a day to claim them. And Bracton in eodem lib. 3, cap. 33, fol. (120) 135, says: "Navis, nec batellus, nec alia catalla de his qui submersi sunt mari, nec in salsa nec in dulci aqua, wreccum erit, cum sit qui catalla illa advocet, et hoc docere poterit"; and so he properly before resembled it to an estray: and if the goods of an infant, feme covert, executrix, man in prison or beyond sea, estray and are proclaimed according to the law, if

none claim them within the year and the day, they shall be all bound. The same law of wreck of sea, for the law is strict and binding in both cases; but it appears by the opinion of BRACTON and BRITTON also, that flotsam, jetsam and ligan so long as they are in or upon the sea, do not belong to the King, sed occupanti concedunt', quia non est aliquis qui inde privileg' habere possit, Rex non magis quam privata persona propter incert' rei eventum (et paulo ante reddit inde ration' eo quod constare non possit ad quam regionem essent applicanda. And BRITTON, lib. 1, c. 17, of treasure hidden in the ground, we will that it be ours; and if it be found in the sea, be it to the finder. But as it appears before by the resolution of the whole court, the King shall have flotsam, jetsam and ligan, as is aforesaid by his prerogative, although they be in or upon the sea; for the sea is of the King's allegiance, and parcel of his Crown of England, as it is held 6 Rich. 2, Protect. 46 and BRITTON, c. 33, well agrees with the opinion of BRACTON, sc. that wreck is of a thing in nullius bonis; for there he says that it is also purchased by franchise granted, by name of a thing found in no man's goods, as wreck of sea, and cattle estraying, coneys, hares, partridges, and other savage beasts, by franchise to have wreck found in his soil, and waif and stray found in his fee, warrens, and in his demesne lands.

RIGDEN AND OTHERS *v.* VALLIER

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), March 25, 1751]

[Reported 3 Atk. 731; 2 Ves. Sen. 252; 26 E.R. 1219]

Tenancy in Common—Creation by deed or will—Grant to M. and H. of rents of estate "equally to be divided between them."

A grantor, being seised of a gavelkind estate, by deed poll dated Aug. 5, 1710, granted to his daughters, M. and H., the rents of the estate "equally to be divided between them," paying £5 a year to his wife, A., for life, and after her death to M. and H. to hold to them and their heirs "equally to be divided between them." At the end of the deed was a gift of his personal residue to M. and H. to be equally divided between them. On the grantor's death in 1714 M. and H. entered into possession and paid £5 yearly to A. until her death in 1718. H., having died in 1728 leaving an infant son R., M. continued in possession and accounted for a moiety of the rents to R. who died in 1730. The plaintiffs, as R.'s heirs-at-law, claimed to be entitled to H.'s moiety.

Held: the limitation to M. and H. in the deed poll created a tenancy in common whether the document was considered as a deed or a will, and so M. must account to the heirs-at-law of R. for the rents and profits of his moiety.

Notes. Considered: *Goodtitle d. Hord* v. *Stokes* (1753), Say, 67; *Harrison* v. *Barton* (1860), 1 John. & H. 287. Referred to: *Campbell* v. *Campbell* (1792), 4 Bro.C.C. 15; *Morley* v. *Bird*, [1775–1802] All E.R.Rep. 108; *Aveling* v. *Snipe* (1815), 19 Ves. 441; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; *Matson* v. *Dennis* (1864), 4 De G.J. & Sm. 345; *Steeds* v. *Steeds*, [1886–90] All E.R.Rep. 1021.

As to the creation of tenancy in common by grant or devise, see 32 HALSBURY'S LAWS (3rd Edn.) 339; and for cases, see 49 DIGEST (Repl.) 910 et seq.

Cases referred to:

(1) *Fisher* v. *Wigg* (1701), 1 Salk. 391; 1 Com. 92; Holt, K.B. 369; 1 Ld. Raym. 622; 12 Mod. Rep. 296; 1 P.Wms. 14; 2 Eq. Cas. Abr. 535; 91 E.R. 339; 49 Digest (Repl.) 910, *8555*.

(2) *Anon.* (1684), 2 Vent. 365; 86 E.R. 489; 38 Digest (Repl.) 818, *279.*
(3) *Hammerton* v. *Clayton* (1662), cited 1 Ld. Raym. 631; sub nom. *Hamerton* v. *Cleyton*, Carth. 342.
(4) *Smith* v. *Johnson* (1680), cited 1 Ld. Raym. 624.
(5) *Kibbet* v. *Lee* (1619), Hob. 312; 80 E.R. 455; 40 Digest (Repl.) 592, *955.*
(6) *Jackson* v. *Trimmer* (circa 1750), unreported.

BILL for an account of rents and profits.

George Everinden being seised of an estate in Kent of the tenure of gavelkind, by deed poll dated Aug. 5, 1710, in consideration of natural love to his wife and children, did give, grant and confirm to his two daughters, Margaret, the defendant, and Hannah, the rents and profits of his two messuages and lands in Lyninge in his own occupation, during the life of his wife "equally to be divided between them," paying £5 yearly out of the premises last mentioned to Ann, his wife, for her life, by half-yearly payments, and after his wife's decease to his two daughters, Margaret and Hannah, to hold to them and their heirs, "equally to be divided between them." At the end of the deed was a clause by which he gave residue of his personal estate, after debts and funeral expenses, to his daughters, to be equally divided between them.

On April 28, 1714, George Everinden died, leaving Ann, his widow, and five children, namely, Margery, deceased, the plaintiff, Elizabeth, and Sarah (the mother of the other plaintiffs), the defendant, Margaret, and Hannah, the late wife of John Dixon, both deceased. On their father's death, Margaret and Hannah entered on the premises granted to them, and paid the £5 a year to their mother until her death on Sept. 9, 1718. Hannah died on April 10, 1728, leaving one son, Richard Dixon, an infant. The defendant, Margaret, afterwards married William Vallier, and continued in possession from the death of Hannah, and accounted for a moiety of the rents and profits to John Dixon to the time of the death of his son Richard, on Feb. 5, 1730. On the death of Richard the plaintiffs and the defendant were his heirs-at-law, and also heirs of Hannah, by the custom of gavelkind, because Margery, the other daughter was dead without issue, and the father of Richard, having after the decease of Hannah married another wife, had, according to the custom of gavelkind, forfeited his estate as tenant by the curtesy. Thus, the plaintiffs and the defendant became entitled to Hannah's moiety of the premises and the rents and profits thereof. The defendant, Margaret, however, had ever since Hannah's death been and now was, in possession of the whole, being £20 per annum, and not only received the rents but cut down and sold the timber and had the title deeds in her possession.

The bill was brought for an account of the rents of the premises and money raised by sale of timber, and for an order that the plaintiffs might be paid their proportions, and that the title deeds might be brought into court, or otherwise secured for the persons interested.

The defendant contended that the premises were given by her father under the deed poll, to hold to her and her sister as joint tenants and not as tenants in common; that by surviving her sister she became entitled to the whole, and she refused to account for the rents or timber, or to produce the deed poll or title deeds.

The plaintiffs contended that the deed poll being a grant to them and their heirs for ever equally to be divided between them, and operating as a covenant to stand seised, they were tenants in common and not joint tenants; and that Hannah's moiety did not survive to the defendant, Margaret, but descended to her son, Richard, of which she herself was so sensible that on Hannah's death she, Margaret, accounted for a moiety of the rents to John Dixon for the use of his son till his death, but now absolutely refused to account.

LORD HARDWICKE, L.C.—The question in this case is whether the limitations in the deed poll of Aug. 5, 1710, executed by George, are a joint tenancy or a tenancy in common.

The deed begins as a deed poll but is, in fact, a disposition of his real and personal estate and to take effect after his death. This may be good as a covenant to stand seised, but if it were to be considered as a conveyance it would not be good, because there is no transmutation of possession.

The present point often appears in the books. "Equally to be divided" is now established to be a tenancy in common in a will, or if it was "equally" only, without the subsequent words annexed to it, would be so construed. But it is contended to be otherwise in the case of a deed, and although I do not find any solemn determination of this sort, yet the distinction to be sure is often made in the books.

In *Fisher* v. *Wigg* (1) there was a surrender of a copyhold estate to the use of A., B. and C. and their heirs, "equally to be divided betwixt them and their heirs respectively." This was held by GOULD and TURTON, JJ., a tenancy in common, by reason of the apparent intent of the surrender, against the opinion of HOLT, C.J., who thought it a joint tenancy. I do not find that this judgment has been reversed, so that it is undoubtedly an authority.

The case in 2 VENT. 365 [*Anon.* (2)] in Chancery, is also to the same purpose, where a covenant to stand seised to the use of A. for life, and afterwards to two "equally to be divided," and their heirs and assigns for ever, was adjudged by the LORD KEEPER NORTH to be a tenancy in common. I have had the Register searched for this case, and cannot find it; but notwithstanding that it was not entered, it might have been so determined, and is so cited by GOULD, J., in *Fisher* v. *Wigg* (1).

Hammerton v. *Clayton* (3) was adjudged a tenancy in common on the same words; but that case is not much to be depended upon, because at the end of LORD RAYMOND'S report of *Fisher* v. *Wigg* (1) it is said to be cited by Sir Edward Northey only, and the case was not to be found.

In *Smith* v. *Johnson* (4) in the Court of King's Bench, there was a feoffment to two and their heirs, "equally to be divided between them, to the use of them and their heirs." SCROGGS, C.J., and DOLBEN, J., were of opinion that it was a tenancy in common. JONES, J., was of another opinion on the difference between a deed and a will. Notwithstanding that there was a rule in that case for judgment nisi, yet nobody being satisfied with the opinion, the rule was on motion set aside, and it was made an ulterius concilium, and ended afterwards by the death of the parties.

In the present case I think it a tenancy in common, whether the instrument be considered as a deed or a will. No person has more reverence for the arguments of SIR JOHN HOLT, C.J., than I; but in *Fisher* v. *Wigg* (1) the arguments of the other two judges are more agreeable to the reason of the thing and his more subtle and finely spun. That was a question on a copyhold estate, and there GOULD and TURTON, JJ., held it ought for that reason to be construed favourably and contrary to the rules concerning conveyances at common law and that they are to be considered as wills because the surrender is often made by the surrenderer in extremis, when he is inops consilii. But SIR JOHN HOLT, C.J., was of opinion that as to raising and passing estates, copyholds ought to be governed by the rules of the common law, that a surrender to uses is only a direction, and the surrenderee is in by the grant of the lord and not within the Statute of Uses. He, therefore, held the case was to be considered as a grant at common law.

Here I must consider it as a covenant to stand seised, and is to take effect after his decease, which could not be good as a conveyance of a freehold to take effect in futuro. It would be very inconvenient to construe a covenant to stand seised, differently from conveyances at common law. But here there are words of regulation or modification, and I do not see any harm in giving them a reasonable construction to answer the intention.

There are other reasons which weigh with me and greatly strengthen my opinion. Here is a father making provision for all his children. Suppose one of them had died and left children, if it were a joint tenancy, it must have gone from them and

survived to the other sons and daughters of the grantor, which could never be his intention.

This court has taken a latitude on the footing of intention that is, that if two persons advance money on a mortgage, although the conveyance be made to them jointly, it shall be a tenancy in common. In the case of advancing money jointly by two persons for a purchase, it has been said, indeed, that the chance is included, and the interest shall survive, but then it must be understood [that it is limited to] where two persons purchasing, advance in moieties, for if there is a disproportion in the sums, it would be otherwise.

The grantor seems to have put his own construction on this deed by disposing of his personal estate in the same words, which is admitted to be a tenancy in common. Therefore, it would be extraordinary if he meant differently in the other, [i.e., the real estate].

This is as near a testamentary case as can be, and it might have been proved as a will. *Kibbet* v. *Lee* (5) was on a deed, and yet proved; and since that determination there has been another, *Jackson* v. *Trimmer* (6), in the Court of King's Bench, about a year ago.

No objection to this construction arises from the word "grant," for a grant must be construed equally with the words "devise" or "bequeath," if in a will; and this is quasi a testamentary act and, therefore, must be considered as a will.

Decree accordingly.

SMITH d. DORMER *v.* PACKHURST AND OTHERS

[House of Lords (advised by Willes, C.J., and other judges), February 23, 1742]

[Reported Willes, 327; 3 Atk. 135; 125 E.R. 1197]

Document—Construction—Construction to give effect to deed—Construction most agreeable to grantor's intention and meaning—Power to alter or insert words—Rejection of words "merely insensible."

Such a construction ought to be made of deeds that the end and design of the deeds should take effect rather than the contrary. The words are not the principal things in a deed, but the intent and design of the grantor is.

The court has no power to alter the words or to insert words which are not in the deed, but it may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. The law commends the cunning of judges in construing words in such a manner as shall best answer the intent.

Notes. Considered: *Marquis Cholmondeley* v. *Lord Clinton* (1820), 2 Jac. & W. 1. Applied: *Colmore* v. *Tyndall* (1828), 2 Y. & J. 605; *Ford* v. *Beech* (1848), 11 Q.B. 852. Referred to: *Burton* v. *Barclay* (1831), 9 L.J.O.S.C.P. 231; *Pannell* v. *Mill* (1846), 3 C.B. 625; *Beaumont* v. *Salisbury* (1854), 24 L.T.O.S. 166.

As to general rules on interpretation of deeds, see 11 Halsbury's Laws (3rd Edn.) 381 et seq.; and for cases, see 17 Digest (Repl.) 261 et seq.

Cases referred to:

(1) *Comberford* v. *Birche* (1676), 2 Lev. 157.

(2) *Jemmot* v. *Cooly* (1666), 1 Lev. 170; 2 Keb. 270; 83 E.R. 353; sub nom. *Jemott* v. *Cowley*, 1 Saund. 112; T.Raym. 158; 1 Sid. 344, Ex. Ch.; 39 Digest (Repl.) 221, 977.

(3) *Hunt* v. *Bourne* (1703), 1 Salk. 339.
(4) *Carter* v. *Barnadiston* (1718), 1 P.Wms. 505; 49 Digest (Repl.) 981, *9196.*

Appeal by the defendants to the House of Lords on a writ of error from a judgment of the Court of King's Bench (7 Term Rep. 366) in an action of ejectment brought to recover the manor of Sidbon and other premises in Bucks.

John Dormer, in 1662, on the marriage of his eldest son, John Dormer, made a settlement of his estate with several limitations. After limiting an estate to his son, John Dormer, and the heirs of his body, he limited his estate as follows:

"and in default of such issue, to the use and behoof of Robert Dormer, one of the brothers of the said John Dormer, for the term of 99 years, if he shall happen so long to live; and from and after the death of the said Robert Dormer, or other sooner determination of the estate limited to him for 99 years, to the use and behoof of T. S. and J. R. and their heirs during the life of the said Robert Dormer, upon trust to preserve the contingent uses and estates herein after limited from being defeated and destroyed, and for that purpose to make entries and bring actions, as the case shall require; but to permit the said Robert Dormer and his assigns to receive the rents and profits of the said estate during the term of his life, and after the end or other sooner determination of the said term, to the use and behoof of the first and every other son of the said Robert Dormer in tail male, with remainder in the same words to Fleetwood, another brother of the said John Dormer, remainder to Peter, another brother, and the last remainder to Eusebe, the father of the lessor of the plaintiff, for 99 years, if he so long live, remainder to the trustees in the like manner as in the limitation to Robert Dormer, and to the first and every other son of Eusebe Dormer in tail male."

Robert Dormer had one son Fleetwood, and when he came of age, Robert and his son, Fleetwood, levied a fine to make a tenant to the præcipe, and suffered a recovery, in which Fleetwood was vouched. Fleetwood died without issue, then Robert Dormer died, leaving no other son but four daughters. Fleetwood and Peter both died without issue, and Eusebe being dead, his son, the lessor of the plaintiff, and the nearest surviving remainderman, made his actual entry within five years, and being so seised demised to the plaintiff, etc.

Two questions were proposed by **LORD HARDWICKE, L.C.,** for the opinion of the judges: (1) whether the remainders limited to the first and every other son of Eusebe were good remainders in their first creation; and (ii) whether the fine and recovery suffered by Robert Dormer and his son barred these remainders.

The opinion of the judges was delivered by

WILLES, C.J., who after stating the facts as set out above, said: Before I proceed to the questions, I shall lay down some general rules and maxims of the law as to the construction of deeds. First, it is a maxim that such a construction ought to be made of deeds, ut res magis valeat quam pereat, that the end and design of the deeds should take effect rather than the contrary. Another maxim is, that such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor. We have no power, indeed, to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. These maxims, my Lords, are founded on the greatest authority, Sir Edward Coke, Plowden, C.JJ,. and Sir Matthew Hale, C.J. The law commends the astutia, the cunning, of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may show the ingenuity of counsel, but is very ill becoming a judge.

Having laid down these maxims, I shall proceed. In this case the intention of

A the party cannot be doubted; the grantor manifestly intended to continue the estate in his name and blood as far as he could by the rules of law. The law will not admit a perpetuity, but the intention of the party, so far as is consistent with the rules of law, ought to be observed. In this case, it was said that the intention of the party by appointing trustees to preserve the contingent remainders, was only to preserve the estate until there were issue of Robert Dormer, and that they B were not meant to preserve the distant remainders; but if this had been the case, how came Robert Dormer not to be made tenant for life, for even though he had been tenant for life, the trustees could have preserved the remainders until his son came of age. The plain intent of making him tenant for 99 years only, was to prevent him and his son from barring the estates in remainder without the joining of the trustees, the effect of which is that it could not be barred without the con- C sent of the trustees during the life of Robert Dormer, which is going as far as the law will permit.

The objections to the limitations to the first and other sons of Eusebe, etc., were these: first, that the commencement of the estate to the trustees and to the first son was at the same time, and consequently the latter limitation was void. Secondly, that the limitations were inconsistent, and, therefore, void. Thirdly, D that where there is an estate limited on two disjunctives which cannot stand together (because if one happens the other cannot), in such case, it shall take effect on neither, but the settlement shall rather be construed to be void.

As to the first objection, we are clearly of opinion that the limitation of the estate to the trustees and to the first son [of Eusebe] etc., commenced at different times. In support of the first objection it was said that an estate limited during E the life of another to commence at his death is void; this is certain, but when the deed goes on and says: "or other sooner determination of the term for years," this manifestly fixes a commencement of the estate to the trustees at the determination of the term, which might happen not only by effluxion of time but may take effect by surrender or forfeiture, several ways, in the lifetime of Robert Dormer or Eusebe, and we are of opinion that the estate of the trustees might so commence, F but the estate to the first son, etc., could not commence until the death of their respective fathers.

It is said by SIR EDWARD COKE, C.J. [CO. LITT. 45 b.] that the word "term," though it is more properly applied to a term for years, yet may mean an estate for life, and it is plainly in this deed used in that sense. The trustees are to permit Robert Dormer, etc., to receive the profits during the term of his life and the G estate to the children is not to commence until the end, or other sooner determination of the said term, which, by referring the relative to the last antecedent, must mean the term of his life. As to the words "sooner determination," inserted after the estate for life, these are insensible and may be rejected. They were probably thrown in currente calame or by following a precedent, and if the precedent was before the Reformation when there was a civil death, as well as a natural, by en- H tering into religion, it might then have a meaning.

As to the second point, since we are of opinion that there was a different commencement of the estates limited to the trustees and the issue in tail, there is no inconsistency.

As to the third, it is highly absurd and against reason and, I think, against law too. In support of this, however, *Comberford* v. *Birche* (1) was cited by the de- I fendants' counsel. There the settlement was with a proviso, that in case none of the brothers or sisters of A. or any of the children be living, then immediately, or after a term of 21 years ended, to the use of B., C. and D. his brothers, successively in tail male, remainder to the plaintiff. A. died without issue, B. and C. died without issue male, but B. had issue a daughter, and A. himself had sisters living. This the court held to be one sentence and a condition precedent, that none of the brothers or sisters of A. or any of their children be then living and which, as it had not happened, all the remainders were void, and gave judgment for the defendants. It was not at all determined on the necessity that the remainders

should take effect on both disjunctives. That case, however, does not come up to the present, for it was never intended that the remainder should vest on the death of Robert Dormer, but as appears by the express words on a determination of the estate "for 99 years" before his death. Such a construction as the defendants' counsel contended for, would destroy not only the remainder to Eusebe, but every one of the remainders limited by the deed, except the remainder to John Dormer and his heirs; and the words of the deed must be extremely strong, which would induce us to construe all the limitations in the deed to be void. We, therefore, are of opinion that the limitations to the first and every other son of Eusebe, were good remainders.

As to the second principal question, whether the limitations to the first and other sons of Eusebe, were well barred by the fine and recovery, without the joining of the trustees, it was insisted on to show they were barred, first, that no estate at all vested in the trustees; secondly, if any estate vested, it was a contingent estate or a right of entry only; and, thirdly, that whatever estate it was, it was effectually barred by the fine and recovery.

As to the first, we are of opinion that an estate commenced in the trustees immediately after the determination of the term for years, by effluxion of time, forfeiture, or otherwise.

As to the second, whether the estate to the trustees was a vested or contingent estate, appeared to us the great difficulty in the case. The doctrine of contingent remainders is very nice and intricate, and if we were to cite all the cases in the books, I fear we should puzzle rather than explain the difficulty. The definition of a contingent remainder, laid down by counsel for the plaintiff, that a remainder was contingent when it was uncertain whether it would take effect or not, is, by no means, the legal notion of a contingent remainder. It is not the uncertainty of taking effect in possession that makes it contingent; if an estate is limited to A. for life, remainder to B. and the heirs of his body, everyone will allow that this is a vested remainder; and yet it must be allowed that it is uncertain whether B. may not die without heirs of his body before the death of A. and consequently the remainder may never take effect in possession.

We have considered this point a good deal and are of opinion that all contingent remainders may be reduced to these two heads: first, where a remainder is limited to a person not in being and who may possibly never exist; and, secondly, where a remainder depends on a contingency collateral to the continuance of the particular estate. I will give an instance of each. If an estate is limited to A. for life, the remainder to his first son before he has any child, this is a contingent remainder of the first kind, for it is uncertain whether he will have any son. If an estate is limited to A. for life, and after the death of J. S. to B. in fee, or after J. S. shall come from Rome, this is a contingent remainder of the second kind, for it is uncertain what time J. S. shall die, or shall come from Rome. For as the law, for many good reasons, will not permit the freehold to be in abeyance, it expects the contingent remainder to take place when the particular estate determines, and it cannot immediately vest in those cases, when it is uncertain whether the contingency will happen.

The present case comes under neither of these heads; the trustees are in being, and capable of taking. The estate does not depend on any contingency collateral to the continuance of the particular estate. We, therefore, are of opinion that, subject to the term of 99 years, a good estate of freehold vested in the trustees during the life of Robert Dormer. I will put one case: supposing a person grants an estate to A. for 99 years, if A. should so long live, and after the death of A. to another; supposing A. should outlive the term, or commit a forfeiture, is not the freehold vested in the grantor during the life of A. and has not he a power to enter, and if he has an estate in this case, may he not grant it away on the same terms, and would not his grantee have the same estate? But consider what would be the consequence if the trustees do not take but on a contingency, their heirs cannot take; and if the trustees die before the contingency happen, the limitation to

A their heirs fails. Also, if the estate limited here to the trustees is contingent, so are the limitations to trustees in all settlements and consequently, all the settlements for the 200 years since the Statute of Uses, may be questioned. But can we conceive, my Lords, that everyone has been mistaken for these 200 years, and that this new light is just now arisen to us? Surely it is a much less evil to make a construction, even contrary to the common rules of law (though I think this is not B so), than to overthrow, I may say 100,000 settlements; for it is a maxim in law as well as reason, communis error facit jus.

As to the right of entry, I should scarce have thought it deserved an answer but that some weight has been laid on it; we are of opinion that a right of entry always supposes an estate; for what is a right of entry without a right to hold and receive the profits? Therefore, I have always thought that if an estate is granted C to a man, reserving rent, and in default of payment a right of entry was granted to a stranger, it was void. A case was cited [*Jemott* v. *Cowley* (2)] to endeavour to show that a right of entry might submit without an estate. But I am inclined to think some material circumstances in that case are omitted and we are agreed in our judgment that the law is otherwise, and for these reasons are of opinion that not a mere right of entry nor a contingent estate but an estate of freehold, was D vested in the trustees during the life of Robert Dormer.

The last point to be considered is what will be the effect of the fine and recovery. As to the fine, it has been insisted that it is a feoffment on record and that a fine even by a tenant for years is not void; as to this fine, it must be considered either as a fine of lessee for years or as a fine of a reversioner in tail. Fines of a lessee for years, I confess, are not absolutely void but operate by way of estoppel, and, E therefore, bar the parties claiming under them. A reversioner may levy a fine for this reason and it bars the issue in tail, but it can never be conceived that the fine of a reversioner can get the freehold.

Let us, therefore, consider it as the fine of a lessee for years. It has been said that lessee for years, in this case, might have barred all remainders by a feoffment, that a fine sur done, grant et render, supposes a gift which means a feoffment, F and, therefore, is equivalent to a feoffment. I am of opinion that even a feoffment would not have been a bar unless the trustees had been asleep, for they might have immediately entered and possessed the estate; if they had lain by until the recovery had been perfected, that might have been a bar, but that is not to be supposed.

It has been said that a fine supposes a feoffment, but the word "done," although G it sometimes signifies a feoffment, has many other significations; it may signify grants of incorporeal inheritances which will not pass by feoffment, and, therefore, does not necessarily suppose a feoffment. A feoffment differs very materially from a fine, for in notoriety of fact, the feoffment is supposed to be made openly on the land and the feoffee is immediately put into the possession, but a fine has nothing public except the proclamations, and, therefore, by the Act of Parliament of 4 H Hen. 7, c. 24, non-claim runs only from the proclamations; whereas, if a fine supposes a feoffment, it will have its effect from the time of acknowledging which is a private transaction. A feoffment can only lie of land, a fine may be of tithes and other incorporeal inheritances.

Great weight has been laid on SIR EDWARD COKE'S authority [CO. LITT. 10 a.], who says a fine is a feoffment on record. He was certainly a great man which I has made some people think everything he says is right, though he has his mistakes. But in answer to it, I shall offer two or three great authorities and one of equal age and authority with SIR EDWARD COKE. In the cases that were cited at the Bar, it was determined by HOLT, C.J. [*Hunt* v. *Bourne* (3), 1 Salk. 339] and LORD MACCLESFIELD [*Carter* v. *Barnadiston* (4), 1 P.Wms. at p. 519], that a fine was a feoffment on record when the party had such an estate as will entitle him to levy a fine, that is an estate of freehold; otherwise a fine has no effect whatsoever with respect to a stranger, and operates as an estoppel only and bars none but the party claiming under it.

As to the authority I promised which was equal to the authority of Sir Edward Coke, it is he himself who, in Co. Litt. 9 a., has these expressions:

"A feoffment is the most ancient and sure way of conveyance, both for that it is solemn and public, and, therefore, best proved, and also for that it cleareth all disseisins, etc., which cannot be done even by fine and recovery."

So it is Sir Edward Coke's own opinion that a feoffment can effect that which a fine and recovery cannot and, therefore, it cannot longer be maintained that he has laid it down that a fine is to all purposes a feoffment upon record.

It was said that if a fine was void in this case, how would it make a forfeiture? There are many cases where an act may be void against another and yet be a forfeiture to the person. I will give one instance, namely, that of a copyhold tenant. A lease made by him is certainly void against the lord and yet is a forfeiture. On the whole we are of opinion that the fine and recovery were no bar to the remainders.

Judgment affirmed.

ROLFE *v.* PETERSON AND ANOTHER

[House of Lords, February 18, 1772]

[Reported 2 Bro. Parl. Cas. 436; 1 E.R. 1048]

Landlord and Tenant—Covenant—Breach—Agreement to pay additional rent on breach—Liquidated damages—Relief by court of equity.

A lessee covenanted not to plough up any of the ancient meadow or pasture-ground, and, if he did, to pay an additional rent of £5 an acre.

Held: the increased rent was not to be considered as a penalty but as a liquidated satisfaction, fixed and agreed on by the parties, and, therefore, in an action brought to recover it a court of equity ought not to interpose or give any relief.

Notes. In the case of penal rents in respect of agricultural holdings the landlord cannot recover any sum in excess of the damage actually suffered: see s. 15 of the Agricultural Holdings Act, 1948 (28 Halsbury's Statutes (2nd Edn.) 42).

Distinguished: *Hardy* v. *Martin* (1783), 1 Cox, Eq. Cas. 26. Considered: *Astley* v. *Weldon*, [1775–1802] All E.R.Rep. 606. Applied: *Jones* v. *Green* (1829), 3 Y. & J. 298. Referred to: *Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332.

As to nature of penal rents generally, see 23 Halsbury's Laws (3rd Edn.) 542; and for cases see 31 Digest (Repl.) 250.

Appeal by the defendant from a decree of Lord Camden, L.C., setting aside verdicts obtained by the defendant in actions for breaches of covenant for which he had recovered damages.

The appellant, being seised in fee of a mansion house, farm and lands, at Eason in the county of Norfolk, called Eason Hall Farm, by lease dated Sept. 23, 1758, demised the same by the description of a capital messuage or mansion-house, barns, stables, dairy, cart-house, out-houses, dove-houses, yards, gardens, orchard, with the cottages and 400 acres of arable and pasture-land, to be enjoyed corn-tithe free, and the fold course or sheep walk, for the small trip of sheep, then let to John Rackham (except all manner of timber and other trees, wood and underwood, with liberty for the appellant to cut down and carry away the same; and also liberty to survey and view the state and condition, and usage of the premises, and also to repair, build, or rebuild the said capital messuage or mansion house,

A and the out-houses and other edifices of the same, and to lay the materials necessary for that purpose in convenient places belonging to the premises; and also full and free liberty for the appellant, his heirs or assigns, his or their friends, companions, or servants, to hunt, course, set, hawk, fowl, fish, game and sport, in, over, and upon the said leased premises, and every part thereof at all seasonable times, at his and their free will and pleasure; and also free liberty to set, plant, B and transplant fruit-trees, and other trees of all sorts), to hold to the respondents, their executors, administrators, and assigns, for 14 years, from Oct. 10 then next, at the yearly rent of £200 payable half-yearly.

Among other covenants contained in the lease on their part, the respondents covenanted with the appellant, that if any part or parcel of the ancient meadow or pasture-ground, or any other part of the premises that had not been in tillage C within 20 years then last past, should, during the continuance of the said term, be dug up, ploughed, or converted into tillage; or if any part or parcel of the arable lands thereby leased should, in or during the said term, be ploughed or sowed out of course, contrary to the true intent and meaning of the said indenture, or the covenants therein contained, then and in such case or cases, the respondents, or one of them, their executors and administrators, should and would, during the D then remainder of the said term, pay to the appellant, his heirs or assigns, the further yearly rent or sum of £5 for every acre so to be broken up, or converted into tillage as aforesaid, and sown out of course, and so proportionably for every greater or lesser quantity than an acre, or longer or shorter time than a year, over and above the said yearly rent, and upon the days of payment thereof by equal portions; the first payment to be made on such of the said feast days as should E first happen after such digging, ploughing up, or converting into tillage, or sowing out of course as aforesaid.

Further, that the respondents, their executors, administrators, or assigns, or either of them, should not, nor would, during all or any part of the said term of 14 years, hew, fell, cut down, stub up, lop, top, take or carry away, any of the timber trees, timber stands, willows, fallows, pollards, hazles, thorns, hedge-rows, F quicksets, bushes, springs or hedges, standing, growing, or being, or which at any time or times during the said term should stand, grow, or be, in, upon, or about the said premises, except such thorns, bushes, and brambles, as should be wanted to repair the gaps in the fences, to be cut and taken on such places on the premises, where the same could be best spared, and where the least damage should be done to the same thereby, and to be used for that purpose by the respondents, their G executors, administrators, or assigns, in a careful and husband-like manner; and also except such thorns, bushes, brambles, and stakes, as should be wanted to repair the rest of the fences, to be set out by the appellant, his heirs and assigns, as therein after mentioned; and in default of such setting out, then where the same could be best spared, and to be of least damage to the premises; and also except the topwood of pollards, underwoods, and thorns, where the ditching, H cutting, and scowering therein after mentioned should be done; which, after making a good hedge there, and applying the overplus thorns towards repairing the rest of the fences, the respondents, their executors, administrators, and assigns, were to have and take to their own proper use, as therein after mentioned, under the penalty of forfeiting and paying to the appellant, his heirs or assigns, the sum of £5 for every load that should be so hewn, felled, cut down, stubbed up, lopped, or I topped, taken or carried away as aforesaid, and so proportionably for any greater quantity than a load.

And also that the respondents, their executors, administrators, and assigns, should and would from time to time, and at all times during the said term, do his and their best endeavours to preserve all the young trees, layers and quicks, of all kinds, then standing, growing, or being, or to stand, grow, or be, in, upon, or about the said demised premises or any part thereof: and if any person or persons should destroy, spoil, or damage the same, at any time or times during the said term, that then the respondents, their executors, administrators, and assigns, should

and would forthwith from time to time give notice thereof to the appellant, his heirs or assigns, and by whom, to the best of their knowledge, the same was done, or how otherwise the same happened, that such person or persons committing the same might be prosecuted as the law directs. Also, that the respondents, their executors, administrators, or assigns, at their or one of their proper costs and charges, should and would, from time to time, and at all times during the said term of fourteen years, keep and maintain, and at the end or other sooner determination thereof, leave and yield up to the appellant, his heirs and assigns, the gardens of or belonging to the premises, except such part thereof as was thereby agreed to be converted into an orchard, and also the courtyards, and the orchard, and the part of the garden which was to be converted into an orchard, in a handsome, good, and proper manner, as gardens, courtyards, and orchards respectively; and also keep and preserve all and every the fruit trees and other trees there growing and being, or to grow and be there during the said term, by pruning and managing the same and the fences thereof, in a careful and proper manner; the same being to be put into a like state by the appellant, his heirs or assigns, at the commencement of the term. Further, that the respondents, their executors and administrators, should not nor would at any time or times during the said term, sow or cause to be sown any part of the arable lands with winter corn, without first summer-tilling, mucking and tathing the same in an husbandlike manner, except in a dry season, when the lands could not be broken up at or about Midsummer time, in which case the same might be sown with winter corn upon the flag.

The respondents soon after the execution of this lease entered upon the demised premises, and there being a piece of land part thereof, containing ten acres, and called the Whinns or Furzecover, which had not been in tillage within 20 years before the date of the lease (which was not only a cover for and preservation of the game, but also a cover or shelter for sheep in winter time and snowy weather, and being cut at proper seasons produced a considerable profit, such furzes or whinns being used in that country for firing or fencing), the respondents in the beginning of the year 1762 stubbed up all the whinns and furzes growing therein, and sold and disposed of such whinns and furzes for a considerable sum of money, and afterwards converted the said piece of land into tillage, contrary to their covenant, and without the consent or privity of the appellant. The respondents also committed breaches of the other covenants before mentioned; but before any of these breaches of covenant came to the knowledge of the appellant, a question arose between him and the respondents, respecting an allowance of five guineas a year to the respondents, which had been formerly paid for the right of fold-course belonging to the farm, and also with respect to other matters; which questions the appellant and the respondents, on July 22, 1765, referred to arbitration, and the same were decided in favour of the appellant, by the award of Henry Partridge and Charles Turner, on Nov. 30, 1765.

In April, 1766, the appellant first had notice of the ploughing up the said ten acres, and thereupon insisted that the respondents should pay him the increased rents of £5 a year, for each of the said ten acres so ploughed up and converted into tillage contrary to their covenant, and which they had continued in tillage from the time the same were first ploughed up. But the respondents refusing to pay such increased or additional rent, and having broken the several other covenants above stated, the appellant in Trinity Term, 1766, brought an action of covenant in the Court of Common Pleas against the respondents, and declared therein on five several breaches of covenant. (i) For non-payment of the rent of £5 an acre for ploughing up and converting into tillage the said ten acres, and continuing the same in tillage for four years, from April 5, 1762 to April 5, 1766. (ii) For stubbing up and carrying away 40 loads of Whinn bushes, growing on the said demised premises. (iii) For suffering great part of the young trees, layers, and quicks, to be destroyed and damaged. (iv) For not keeping and preserving the gardens, courtyard, orchard, and fruit trees, in a handsome and proper manner,

pursuant to their covenant. (v) For sowing ten acres of land, part of the arable lands of the said farm, with winter corn, without first summer-tilling, mucking, and tathing the same in a husband-like manner. The respondents did not think fit to plead to the declaration, but suffered judgment to go against them by default; and the appellant caused a writ of inquiry of damages to be executed on the said judgment; upon the execution whereof, the former tenant of the farm and several other persons were sworn and examined on the part of the appellant, and proved that by breach of the said several covenants, the appellant's farm had suffered damage to the amount of £300. The jury, therefore, assessed the appellant's damages at £300.

The respondents continuing to keep the said ten acres in tillage, and refusing to pay either the increased rent for the same, or the original rent of the farm, which became due at Michaelmas, 1766, old style, and Lady Day, 1767, old style respectively, the appellant was obliged to bring two actions against them for such respective half-yearly rents, and increased rents, and obtained judgments therein against the respondents by default; and on the execution of writs of inquiry on such judgments, the appellant recovered verdicts for the said respective half years original and increased rents. But the respondents, instead of paying the damages recovered by the appellant in the said several actions, caused writs of error to be brought on the judgments, which were afterwards non prossed [non prosequitur] and the judgments affirmed.

To put the appellant to all possible expense, the respondents, in Trinity Term, 1766, brought an action at law against him, and declared therein for having broken five or six of the covenants contained in the lease; to which the appellant having pleaded performance of covenants, the respondents did not think proper to proceed any further in their action, but filed a bill in the Court of Chancery against the appellant, for an injunction to stay his proceedings on the judgments he had recovered against them; and obtained the common injunction, which, on the appellant's putting in his answer, was dissolved, and the respondent's bill was afterwards dismissed with costs, for want of prosecution. On Nov. 5, 1767, the respondents filed a second bill in the Court of Chancery against the appellant, complaining of the said several judgments and verdicts obtained by the appellant, and particularly with respect to the increased rent of £5 an acre, for the whinns and furze ploughed up and converted into tillage, and alleging that the said ten acres, before they were so ploughed up, were of very little value, and that they were of greater value in a state of tillage; but that in regard the ploughing up the same might subject them to some forfeiture or penalty under the lease, they or one of them acquainted the appellant, his steward, or agent, with their intention to stub up and plough the said ten acres; and that the appellant, or his agent, had given licence or consent to the ploughing up the same, or had afterwards acquiesced therein, and that the appellant, after he had had notice thereof, had received the original rent, and settled accounts with the respondents; and likewise alleging that the subject-matter of the action was taken into consideration by the arbitrators, and the damages for breach of the covenants were included in the award; or if not, that some of the breaches having happened before the award, the appellant was concluded by the award, not to seek any satisfaction for them; and, therefore, praying, that upon payment by the respondents to the appellant of £273 3s. 9d. as the net rent due from the respondents under the lease, from April 5, 1766, after deducting £26 16s. 3d. for land tax, which they had paid; as also upon payment by the respondents of the costs and expenses the appellant had been put to, for or by reason of the commencing and prosecuting any suit or action at law against the respondents, to compel the payment of the said rent, together with a reasonable satisfaction for any damage the respondents should appear to have done or committed to or upon the said farm, or premises thereunto belonging, without the consent of the appellant, which the respondents (if any) were ready and willing to pay; the appellant might be restrained by injunction from taking out execution upon the said judgments, and that the award made by the said Henry Partridge

and Charles Turner, might be duly observed and performed by all parties; and that the appellant and respondents might, in pursuance and performance thereof, execute releases to each other of all matters in difference between them, up to the time of making the said award; and for general relief.

To this bill the appellant put in his answer, and thereby denied his having given any licence or consent for the ploughing up the said ten acres; or that he had any notice before the month of April, 1766, that the same had been ploughed; and he set forth the submission and award, from whence it was evident that the arbitration related only to the special matters mentioned therein, and did not extend to the breaches of covenant, for which the appellant's action was brought.

The respondents replied to the answer, and issue being joined thereon, several witnesses were examined and it was proved, on the part of the appellant, that the farm was greatly injured by the mismanagement of the respondents, and was of less value to be let at the end of the year 1766, than when the respondents took the same; and that since the respondents had ploughed up the said ten acres, they had never clayed or manured the same, nor had given the same one single fallow: but the respondents did not prove any licence or consent from the appellant, or his steward for ploughing up the said ten acres, or that the appellant had any notice thereof before the time of making the award, or before April 5, 1766, or that the respondents had performed the award on their parts; which matters the respondents had alleged in their bill, as the ground of the relief they prayed.

On Nov. 20, 1769, the cause was heard before **LORD CAMDEN, L.C.**, when his Lordship declared that the plaintiffs were entitled to be relieved against the verdicts obtained by the defendant, on making him a just and adequate satisfaction for the damages he had sustained by breach of all or any of the covenants, for which he had recovered damages by the said verdicts. Therefore, it was ordered that the parties should proceed to a trial at law at the next summer assizes to be held for the county of Norfolk, on the following issue, quantum damnificatus, in which action the plaintiffs were to admit the several covenants to have been broken in such manner as the same were averred to have been broken by the declaration in the said action. It was further ordered that the damages that should be found by the jury upon each of the said covenants should be separately endorsed on the postea, and that the defendant should be plaintiff at law, and the plaintiffs be defendants at law, who were forthwith to name an attorney, accept a declaration, and appear and plead to issue. His Lordship reserved the consideration of costs, and all further directions until after such trial, and any of the parties were to be at liberty to apply to the court, as there should be occasion.

The defendant being dissatisfied with this decree, appealed from it.

A. Wedderburn, *J. Madocks*, and *J. Hett* for the defendant argued that the question made by the defendant arose upon the declaration in the decree, and was a general and important question, viz., whether on an action of covenant brought by a landlord upon a lease, and damages therein assessed by a jury, a court of equity has jurisdiction, or ought to direct issues for reassessing those damages. There could be little doubt, they said, upon this question, because in all actions which found in damages, the court and jury had a complete jurisdiction to assess the damages. The verdict either could or could not be set aside for excessive damages. If it could, the proper application was to the court where the action was brought: if that court could not set aside the verdict, the assessment of damages must be final because the question as to the quantum of the damages was not a subject-matter of an equitable jurisdiction. Upon that question merely arising upon an action at law, without any proof of fraud, mistake, or an agreement to waive the verdict, a court of equity could not direct a new trial.

As to the objection that the present case was an exception out of the rule because there was a circumstance in the covenant which would prevent a court of law from setting aside the verdict for excessive damages, for that here the damages were increased to £300 by means of the covenant to pay £5 an acre in-

creased rent for ploughing up the ten acres called the Whinns, that such increased rent was to be considered as a penalty and that though a court of law is bound by a penal covenant, yet a court of equity can relieve against it; it was answered that the £5 per acre increased rent was not a penalty, but a liquidated satisfaction, fixed and agreed upon by the parties, and was reserved as an additional rent. The tenant was under no accidental necessity of ploughing the land, which could excuse him in equity for so doing; nor had he any express or implied permission to do it, but he did it voluntarily, knowing he had a right to do it upon payment of a stipulated sum which he covenanted to pay. Whereas, a penalty is a forfeiture for the better enforcing a prohibition, or a security for the doing of some collateral act, but no prohibition was contained in the covenant in question to restrain the tenant from ploughing; the agreement being, that for land not in tillage which should be ploughed up, a rent should be paid of £5 an acre. The decree was general, and set aside the verdicts entirely, and was not confined to the breach of the covenant for payment of the additional rent. This being a case between landlord and tenant, was of general extent and influence; and if after the most solemn stipulations between the parties, the tenant should be declared to have a right to restrain the landlord from having the fruit of his agreement, and his estate preserved in the condition which he had stipulated for, without one circumstance in the case to excuse the tenant for his wilful violation of the contract, it might be converted into an example greatly detrimental to the landed property of this kingdom, and even mischievous to the tenants themselves.

J. Dunning and *G. Barnes* for the plaintiffs said that the excess of penalties was a proper consideration for courts of equity which for ages past had constantly and uniformly exercised their jurisdiction on this head and ground of relief, and were never employed with such particular propriety, nor so consistently with the chief end of their institution in this kingdom, as when they were used as a temperament to mitigate the rigour of the common law. Landlords and tenants, they said, have ever been the peculiar objects of equity, which has continually interposed in unconscionable bargains between parties bearing that relation to each other, formerly by vacating such leases, but in more modern practice, by giving relief against the penalties where the matter lies in damages, on payment of a compensation adequate to the real injury sustained. These rigorous covenants, though seemingly made for the preservation of estates, are in effect a new mode of raising rents, more oppressive than the proceeding by ejectment; and are not in the nature of a contract, but of a penalty, or vindictive damages, and, therefore, ought to receive no countenance in equity, as the penalty thereby reserved in the name of rent, frequently exceeds the value of the inheritance. In this case in particular, the penalty of £5 an acre reserved during the remainder of the term for once ploughing, amounted to more than thirty times the value of the inheritance of the ten acres, before they were put into a state of cultivation by the respondents. As all amerciaments for punishments at law ought to be salvo contenemento, so courts of equity ought to extend the principle, by giving relief against all reservations nomine pœnæ, where they are apparently excessive, in proportion to the injury committed, if any, and if none, damnum sine injuria was apprehended not to be considered by the law of England. Any estimate of damages between the parties, presupposes an injury committed; but the converting of ten acres into tillage was rather an improvement than an injury to the estate; and though an injury had been really sustained, yet the issue of quantum damnificatus was very properly directed, for the quantity of such damages ought not to be left to the unconscientious estimation of the party, but was the immediate and peculiar province of a jury. The damages of £300 given on the execution of the writ of inquiry in this case were outrageous, and on that account proper to be moderated in a court of equity, which judges secundum conscientiam et arbitrium boni viri; the Court of Chancery, therefore, could not, consistent with these principles, withhold its interposition, or refuse the relief prayed by the respondents under such

peculiar circumstances. The determination in the present case could not affect covenants in relation to ancient meadow or pasture (though even on such covenants the same principles would attach, if the penalties were apparently excessive) because the land ploughed here was not even of like nature or value. The penalties insisted on by the appellant for ploughing Whinn-ground, instead of being beneficial to the estate, was a discouragement of agriculture in general; nor was such ploughing within the true intent and meaning or equitable construction of the lease according to its genuine sense, and the rule of sound interpretation. Consequently, the decretal order made at the hearing of the cause was no control or change of the true stipulation and agreement entered into between the parties themselves, and ought, therefore, to be in all things affirmed.

Decree reversed.

MADDISON *v.* ANDREW

[Lord Chancellor's Court (Lord Hardwicke, L.C.), November 27, 1747]

[Reported 1 Ves. Sen. 57; 27 E.R. 889]

Power of Appointment—Special power—Exercise—Appointment to deceased person.

A testator gave £600 to his wife to be disposed of to and among his three daughters G., S. and A. in such proportions and payable in such manner as she should think fit. The mother gave £200 to G. Later, by her will, the mother gave a further £100 to G., £100 to S., and £200 to A., who was then dead.

Held: the appointment in favour of A. was void, and the £200 purported to be given to her should be divided equally between G. and S., the court having no discretion as to the distribution thereof.

Trust—Resulting trust—Presumption—Rebuttal—Transfer of property into name of another.

R., who owned a lease, renewed it in the name of himself and J. R. alone paid the fine and rents and received the profits. R. died. J. gave uncontradicted and unimpeached evidence that he was intended to have the benefit of it if he survived.

Held: this was sufficient to rebut the presumption of a resulting trust.

Administration of Estates—Order of application of assets—Legacy—Payment out of real property.

R. made a voluntary settlement of real estate in favour of J., but with a power for R. to charge or appoint a sum not exceeding £1,000. By his will R. directed payment of his debts and legacies, charging all his estate, real and personal, therewith.

Held: the personal estate being insufficient, the real property subject to the settlement was liable for the payment of legacies.

Will—Class gift—Ascertainment of class—Time—Gift to children of named person—Only one child in existence at date of will.

R. by will gave a legacy of £300 to the children of S. at 21 or marriage and failing the share of any to the survivors, and failing the share of all to G. At the date of making the will S. had only one child.

Held: all the children that S. should have, and not just the one alive at the date of the will, were to have the benefit of the legacy.

Notes. Considered: *Bartlett* v. *Hollister* (1757), Amb. 334. Applied: *Wilson* v. *Piggott*, [1775–1802] All E.R.Rep. 539. Considered: *Reade* v. *Reade* (1801), 5 Ves. 744; *Doe d. Nowell* v. *Roake* (1825), 2 Bing. 497. Referred to: *Horsley* v. *Chaloner* (1750), 2 Ves. Sen. 83; *Doe d. Devonshire* v. *Cavendish* (1782), 3 Doug.K.B. 48; *Madoc* v. *Jackson* (1789), 2 Bro.C.C. 588; *Kemp* v. *Kemp* (1801), 5 Ves. 849; *M'Ghie* v. *M'Ghie* (1817), 2 Madd. 368; *Thornton* v. *Bright* (1836), 2 My. & Cr. 230; *Fordyce* v. *Bridges* (1848), 2 Coop. temp. Cott. 324; *Butler* v. *Gray* (1869), 5 Ch. App. 26; *Nicholson* v. *Mulligan* (1869), 17 W.R. 659.

As to powers in the nature of trusts, see 30 Halsbury's Laws (3rd Edn.) 210–212; as to exercise of powers by will, see ibid. 229 et seq.; as to resulting trusts where property put into the name of another, see 38 Halsbury's Laws (3rd Edn.) 867–871; as to payment of legacies out of real property, see 16 Halsbury's Laws (3rd Edn.) 353–355; as to distinction between vesting and payment, see 39 Halsbury's Laws (3rd Edn.) 1129; and for cases, see 37 Digest (Repl.) 309–311, and 49 Digest (Repl.) 985–987.

Cases referred to:

(1) *Clere's Case* (1600), 6 Co. Rep. 17b: Jenk. 260; 77 E.R. 279; sub nom. *Cleer* v. *Parker*, Cro. Eliz. 877; sub nom. *Parker* v. *Clere*, Moore, K.B. 567; sub nom. *Clere* v. *Parker*, Cro. Jac. 31; 37 Digest (Repl.) 324, *713*.

(2) *Countess of Coventry* v. *Earl of Coventry* (1724), 2 P.Wms. 222; 1 Stra. 596; Gilb. Ch. 160; 9 Mod. Rep. 12; 1 Eq. Cas. Abr. 348, pl. 19; 2 Eq. Cas. Abr. 660, pl. 8; 24 E.R. 707, L.C.; 40 Digest (Repl.) 642, *1344*.

Questions arising on the construction of a will.

Robert Andrew, having a wife, two sons, Robert and John, and three daughters, Grace, Anne, and Sarah, by his will dated July 21, 1732, devised his real estate to his eldest son, gave all his children £800 portion apiece, and made his wife executrix and residuary legatee. By a clause in the will he gave his wife £600 to be by her disposed of to and among his three daughters in such proportion, and payable in such manner, as she should think fit to give it in her life, either by will, or by any note or deed in writing subscribed by her in the presence of witnesses, or by any other disposition. The mother on the marriage of her daughter Grace, by verbal agreement gave her £200, and afterwards making her will took notice thereof as a part and proportion of her share of £600 and in further pursuance of her power gave her an additional £100. She then gave her daughter Anne, who was dead, and to whom she was executrix, her share of £200, and declaring that as her daughter Sarah had behaved undutifully, and married the present plaintiff without her consent, she would have only the remaining £100. She died leaving her son Robert sole executor and residuary legatee. Robert had made a voluntary settlement of real estate on his brother John, remainder over to his sisters: but he created a term of 1,000 years vested in trustees, that he might by any deed or act executed in his life, limit or appoint any part of the premises to raise any sums not exceeding in the whole £4,000 in his life; which if not done in his life, and he should die unmarried and without issue, he should have power to charge, limit or appoint any sums not exceeding in the whole £1,000. Not having charged in his life as above mentioned, and having no wife or issue, he made a will by which he first directed all his just debts and legacies to be paid, charging all his estate real and personal therewith. Then he gave a legacy of £300 to the children of his sister Sarah, to be paid by his executor, and equally divided share and share alike, at their respective ages of twenty-one or marriage, with interest at 4 per cent., and failing the share of any, to the survivors; and failing the share of all, to his sister Grace. Subject to all this, he gave all his estate real and personal to his brother John.

The first general question, and the most considerable, was as to the £600, Sarah claiming an equal share thereof by the testator's will; and for that purpose to have the mother's distribution set aside, and the £200 appointed to the deceased daughter Anne given to her.

LORD HARDWICKE, L.C.—The power of distribution given to the mother is very large, though confined as to the objects; and the intent was to give her a kind of distress over the daughters. It must be admitted there is a good appointment of the £300 and £100, and if there had been any defect in the verbal agreement, which there was not, the will made it good. The only question is on the £200 appointed to the deceased daughter Anne, and which if it was to vest, could only vest in her executrix, who was the mother herself. Several questions have been made thereon. The first is whether the appointment of it is good; if it is, all the other questions are out of the case. If it is not good, then the next question is whether Anne was entitled to any interest transmissible to her executrix, and if not so, then how the court is to direct the distribution; whether equally or discretionary as the mother might.

As to the appointment, it cannot be maintained, for the mother being limited as to the objects, could appoint it to no other. The testator plainly intended it personally to them, to keep them obedient, and had made other provision for them. If, therefore, Anne had left children, although it would be hard, yet the mother could not give it to them, they not being persons within the description of the power. Much less could she give it to her executor or administrator, who might be a stranger to the family, and so contrary to the testator's intent: as it is in all directions of powers confined to the persons of the objects.

As to the question, whether the mother as representative can claim this by the father's will in default of appointment, that depends on an interest transmissible being vested in Anne, and I think there was not such an interest. As to the vesting or not vesting of legacies, there are several distinctions taken both in the ecclesiastical court, and this court, which follows the ecclesiastical court as to legacies of personal estate: as where in general it is to be paid at a particular day, it is vested, and the time of payment only postponed. But there is no case where the court has held a legacy or interest therein vested, where the certainty of the sum could not be said; as here it could not at the death of the father: so that it was contingent and suspended till the mother's execution of the power, or till it was at an end. To avoid this it is contended that this clause must be construed a gift among them equally, subject to be divested, and the shares varied, by the appointment. But the words of the clause will not bear it, for it is not a gift to the daughters, but to the wife to give, etc., nor are there any words of equality. If it could be a bequest to them, it would be joint, and to survive; which without more would put an end to the question for Anne's representative. But the consideration of the mother's power over it shows further that it was contingent, not vested: the words "such proportion" vary the proportion, she being the judge of it. If she makes an inequality, the court will not enter into the motives of it, unless it be illusory; as in a case where a mother, having such a power, gave only an eleventh part to a step-daughter. Yet even where but a trifle has been given to one, if that child by misbehaviour deserved it (though it must be very gross indeed) the court will not vary it. Then it is also, "in such manner as she pleases"; so that upon an improvident match she might appoint it to the separate use of the daughter, exclusive of the husband, which shows it not to be vested; for the husband would take any interest vested in the wife. If the mother died without appointment, it would go equally among them; the power being over, and it becoming certain and vested. If all three died before the mother, the representative of none would take; but it would sink into the testator's estate, being only for the daughter's benefit. But in this case it survives to those who were alive at the mother's death, it not being vested subject to being divested, but contingent; and if it could vest, it is joint, not in common.

Thirdly, what must become of the £200 of which the mother made no appointment, and nothing vested at the father's death? It is contended that the mother's discretionary power is devolved on the court, which may appoint as it pleases, and ought, therefore, to give the £200 to the plaintiff to make an equality. But there is no such devolution on the court. It is true, that powers have developed on the

court by non-acting, misbehaving, or death of trustees, as in the appointing maintenance, it being a necessary thing: so as to a legacy given under restraints of marriage, to prevent which the court has acted very largely. But this is a particular kind of parental discretion with which the court has nothing to do, so that the true construction is, that since the mother is dead without executing the power as to this part, and there are two of the objects alive, it rests in them equally to be divided, and there is no ground for the court to prefer one; which is consistent with the construction of the former point. But if this power had devolved on the court, there would be no ground to give the plaintiff a preference, whose behaviour has not been commendable and gave the mother just cause of offence: although the court would not, therefore, exclude her entirely.

The second general question was in whom the legacy of £300 in the will of Robert the son should vest, whether in the only child of Sarah alive at the making the will or also in those since born or to be born. The Lord Chancellor said: I doubted at first, but now think it was meant for the benefit of all the children Sarah should have, for the testator, knowing she had but one then, has yet given it to children, has appointed out survivors and gives it over to another branch of his family; which he could not mean till all failed.

The third general question was as to the fund for the payment of this £300 legacy, personal assets not being admitted sufficient: in aid of which, it was contended that a leasehold estate held of the Dean and Chapter of Durham should be brought as equitable assets, for that though the testator on the renewal of the lease had inserted his brother John the defendant's name with his own, he was only a trustee; for the testator only paid the fine and rents, and received the profits. To rebut which, the defendant proved that the testator put in his brother's name, as his father did his; and intended he should have the benefit of it if he survived; which though but by one witness, yet being uncontradicted and unimpeached, the Lord Chancellor held was sufficient evidence to rebut the resulting trust, and in support of the survivorship, the term being in point of law vested in them both; and all resulting trusts being liable to be rebutted by evidence of the testator's intent. So that this was not part of the assets of Robert the son.

Then the plaintiff contended that the £1,000 which Robert had power to charge on the real estate should be assets, or a charge by the will for payment of the legacy. The Lord Chancellor was of opinion that it should, for being a power reserved by the absolute owner of the estate making a voluntary settlement on his brother, it should be construed liberally, being a reservation of part of the ownership: although it is different where the power is over the estate of a stranger; and yet some of those have been construed liberally, to the prejudice of the remainderman. Then as to his execution of it, he has used the word "charge," which is the word in the power; nor is there any occasion for his referring to the power if he does it in substance: as in *Clere's Case* (1): and it is only a shadow of a difference that he has charged all his estate; whereas this was before settled to uses, for these powers to the owner are to be considered as part of the property: but this is most strictly so, the term being in trust for himself, which is the same as the legal estate. This case is stronger than *Countess of Coventry* v. *Earl of Coventry* (2), where a power, though never executed, was held to charge the remainderman on this same ground, being part of the ownership.

A

WRIGHT *v.* WRIGHT

[Lord Chancellor's Court (Lord Hardwicke, L.C.), March 15, 1750]

[Reported 1 Ves. Sen. 409; 27 E.R. 1111]

Chose in Action—Assignment—Equitable assignment—Expectant interest—Consideration—Assignment for advancement of assignee.

B

A testator devised land to two sisters and their heirs, but provided that, if either of them married without the consent of his executors, she should have only an estate for life. If either died unmarried, R. or his heirs was to take her share to him and his heirs, paying £500 to the other daughter. R., in the lifetime of the two sisters, conveyed all his right, claim, etc., in the property to his younger son in consideration of love and affection and for his advancement. R. then died. One sister died unmarried, the other married with consent.

C

Held: the assignment by R. was for consideration, and, therefore, valid, and the heir of R. could not claim the land on payment of the £500.

D

Notes. Referred to: *Stone* v. *Lidderdale* (1795), 2 Anst. 533; *Doe d. Brune* v. *Martyn* (1828), 8 B. & C. 497; *Harris* v. *Davis* (1844), 1 Coll. 416; *Crofts* v. *Middleton* (1856), 8 De G.M. & G. 192; *Re Wait* (*Trading as Wait and James*), *The Trustee* v. *Humphries and Bobbett*, [1926] All E.R.Rep. 433.

As to equitable assignments generally, see 4 Halsbury's Laws (3rd Edn.) 492 et seq., and ibid., vol. 14, p. 574 et seq.; as to contracts relating to expectant interest, see 36 Halsbury's Laws (3rd Edn.) 277 et seq.; and for cases see 8 Digest (Repl.) 560, 561.

E

Cases referred to:

(1) *Thomas* v. *Freeman* (1706), 2 Vern. 563; 23 E.R. 967; 8 Digest (Repl.) 560, *132*.

(2) *Wind* v. *Jekyl* (1719), 1 P.Wms. 572; 24 E.R. 522, L.C.; 48 Digest (Repl.) 246, *2217*.

F

(3) *Theobalds* v. *Duffoy* (1724), 9 Mod. Rep. 102; 88 E.R. 342; (1730), cited 1 P.Wms. 574, n.; 2 Eq. Cas. Abr. 88, H.L.; 20 Digest (Repl.) 353, *798*.

(4) *Beckley* v. *Newland* (1723), 2 P.Wms. 182; 24 E.R. 691, L.C.; 48 Digest (Repl.) 447, *3986*.

(5) *Hobson* v. *Trevor* (1722), 10 Mod. Rep. 507; 2 P.Wms. 191; 88 E.R. 829; sub nom. *Hopson* v. *Trevor*, 1 Stra. 533, L.C.; 44 Digest (Repl.) 115, *946*.

G

(6) *Harvey* v. *Harvey* (1739), 9 Mod. Rep. 253; Barn. Ch. 103; 2 Eq. Cas. Abr. 669, pl. 22; 88 E.R. 433; sub nom. *Hervey* v. *Hervey*, 1 Atk. 561, L.C.; 40 Digest (Repl.) 643, *1349*.

Bill claiming an estate.

H

Wright devised to his two daughters Mary and Sarah, and their heirs and assigns, lands in Downham, but if either of them should marry without consent of his executors, the daughter so marrying should have only an estate for life therein; if either of them should die unmarried, his son Robert, or his heirs, should take her share to him and his heirs, paying £500 to the other daughter. Robert in 1728 in the lifetime of both his sisters made a conveyance that, whereas his sisters were entitled to the possession and rents and profits thereof during the lives, and immediately after their death he was under the same will entitled to the reversion thereof to him and his heirs, in consideration of natural love and affection and advancement to his son George, he conveyed and granted all that and all other lands, etc., whatsoever, whereof he, or anyone in trust for him, had any estate either in law or equity in possession, reversion or remainder, and which he had any right title, claim, or demand to under the will of his father in Downham. Robert died in 1731, Sarah died unmarried in 1744.

I

This bill was brought by the eldest son and heir-at-law of Robert to have this

A estate on payment of £500 to the other daughter Mary, who had married with consent.

LORD HARDWICKE, L.C.—This is a claim by an heir-at-law against the act of his ancestor, done for what this court calls a valuable consideration in the second degree, by way of provision or advancement for a younger child. There are B two questions. First, whether Robert had such a contingent interest, or right, or possibility, in the lands in question as by any act in the consideration of this court he could convey, assign or dispose of. Secondly, supposing he had such a contingent interest as a possibility is properly described to be, whether in fact he has conveyed it by the deed he has executed.

As to the first, I think he had such as he could dispose of under certain terms C and circumstances, though not in all events whatever. Whether this possibility was in him, depends on the disjunctive words in the will: and I am of opinion he must take as through his ancestor, and as heir. It is a miswriting therefore; and "or" should be construed "and" which is a frequent construction, as in a devise or grant to one or his heirs, to hold to him and his heirs: it is a fee. As to the nature of the interest here given, the will is very oddly worded. What might D mislead them into that recital in the deed was that if the estates were turned into estates for life, he would have a vested remainder. But it was still an executory devise, not a remainder on a fee given before; and in a reasonable compass of time, of the life of the daughters, will thereby go to Robert and his heirs: in which case if the first person dies before the contingency happens, his heir takes by descent through him, not by purchase. But that is still in notion of law a E possibility, which though the law will not permit to be granted or devised, still it may be released, as all sorts of contingencies may, to the owner of the land. The reasons of the law's not allowing such a disposition, which this court will, are mostly very refined: and LORD COWPER says in *Thomas* v. *Freeman* (1), these sort of notions would not have prevailed now. However, the law must be taken as it is. There was a wise reason in the law's not allowing a right to sue to be assigned: F that it tended to champerty and maintenance to pass debts into the hands of the more powerful to oppress lower people. Yet it is now established in this court that a chose in action may be assigned for valuable consideration, and this may be released as a chose in action may: and then why may not it be put into such a shape as to be disposed of to a stranger, or to make him trustee for a stranger? This court admits the contingent interest of terms for years to be assigned for G valuable consideration, though the law does not; and further permits them to be disposed of by will, as in *Wind* v. *Jekyl* (2). But that depends on the same reason as a bequest of a chose in action, viz., that the court will not suffer an executor or administrator with the will annexed to claim in contradiction to the will; and besides will make it good in the case of a consideration, as in *Theobalds* v. *Duffoy* (3), in the House of Lords in 1730, which was the strongest case, being an act H of a feme covert; and yet it was established: and I should not doubt in the case of an assignment of a term for years, not for money, but for a younger child, this court would make it good against the other children, and the executor or administrator. But this is said to be a contingent interest or possibility of an inheritance, and that there is no case of making that good: as to which, there is no difference in the reason of the thing between that and the allowing of an assignment of a I possibility of a personal thing or chattel real: the heir must take by descent and suggestion from the ancestor.

Consider how far the cases have gone of *Beckley* v. *Newland* (4) and *Hobson* v. *Trevor* (5). The latter goes a great way. There was an agreement on marriage to settle all such lands as should come by descent or otherwise from his father, which this court carried into execution, notwithstanding an expectancy of an heir-at-law in life of his ancestor is less than a possibility. It is such as he may bind himself: in law, the heir may levy a fine of lands in the life of the ancestor, which will bind by estoppel after descent to him. So there is a method of conveying, that

is, preventing a claim against it; and so here he may release. In that case it was made good by way of agreement for valuable consideration. How does an assignment differ from it? An assignment always operates by way of agreement or contract, amounting in the consideration of this court to this, that one agrees with another to transfer, and make good that right or interest; which is made good here by way of agreement. So was *Beckley* v. *Newland* (4), which was a little to be favoured as any case whatever. I agree that to some purposes the present consideration is not so strong as that for money. If the question came to be between the child so advanced for love, etc., and a creditor bona fide, the equity of the creditor will be superior to that of the child: but as against any claiming voluntarily from the father, as executor, administrator, or heir-at-law, it is a consideration, and only made so in the second degree, where the question is with a creditor who is a purchaser. Then why does not this operate by way of agreement? Suppose the father had entered into a contract with his son, that in consideration of natural love and affection, and the advancement he was naturally bound to make for him, he agreed for himself and his heirs this younger son should have the lands when the event should happen, the heir would be bound; and upon a bill brought against him the court would have decreed it on the foot of the equitable consideration, and within the cases of making good defective executions of powers, and a devise of copyhold without surrender. This is the same thing, though not in that shape; the court not laying weight on the manner, but the substance. If that was the consideration in *Harvey* v. *Harvey* (6), there was a much stronger objection thereto, for there was not a colour of an attempt to make it good. But I agree with the plaintiff that this would not have been good by a will, and I think all these cases of personal things differ from cases of real estate, in which, if not well devised in point of law for want of a legal manner of executing the instrument or of power in the devisor, the heir may claim in contradiction to the ancestor, who must claim according to the will.

The next question is, supposing this so whether he has in fact assigned or conveyed. That he intended it is no doubt, although it is awkwardly drawn: it was taken for granted that Sarah would die unmarried. He has taken upon himself to convey everything, though he has unluckily left out the most proper word "possibility." It is true he has no immediate claim or demand; but the word "claim" may describe it in præsenti or futuro; and there is a covenant for further assurance. This, therefore, is well described, and it is incumbent on this court to make the most liberal construction for its taking effect, because it is in the case of a younger child.

The plaintiff, therefore, has no right to this redemption for £500 as he claims by his bill but it must be dismissed with costs.

Bill dismissed.

PELLS *v.* BROWN

[Court of King's Bench (Sir Henry Montagu, C.J., Doderidge, Houghton and Chamberlayne, JJ.), Michaelmas Term, 1620]

[Reported Cro. Jac. 590; 3 Dyer, 354a; J. Bridg. 1; 2 Roll. Rep 196, 217; Godb. 282; Palm. 131; 79 E.R. 504]

Will—Conditional limitation—Devise to A. and his heirs—Limitation on failure of issue—Failure during lifetime of stranger—A. suffers a common recovery without vouching stranger—Executory devise to stranger not barred.

On a devise to A. and his heirs, and, if he die without issue in the lifetime of C., then to C. and his heirs, if A. enter and suffer a common recovery without vouching C. the executory devise to C. is not barred by the recovery.

Will—Conditional limitation—Devise to A. and his heirs—Limitation on failure of issue—Failure during lifetime of stranger—A. takes estate in fee, not estate in tail.

A devise to "A. and his heirs for ever, paying to B. £20, and, if A. die without issue, C. living, then C. shall have the land, paying the said sum as A. should have paid," conveys to A. an estate in fee, and not an estate in tail.

Perpetuities—Executory devise—Application of rule—Devise to A. in fee—Limitation on failure of issue—Failure during lifetime of stranger—Valid executory devise contingent on A. dying without issue in lifetime of stranger.

A devise in fee to A. and if he die without issue in the lifetime of C. then to C. and his heirs, is a good executory devise to take effect on the contingency of A. dying in the lifetime of C. without issue.

Land—Fee simple—One fee in remainder after another—Validity.

Per curiam: One fee cannot be in remainder after another, for the law does not expect the determination of a fee by [failure of issue].

Notes. The words "die without issue" or "die without leaving issue" etc., have been given a statutory meaning by s. 29 of the Wills Act, 1837 (26 Halsbury's Statutes (2nd Edn.) 1350). Restriction on executory limitations is provided by s. 134 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 769). Power to specify a perpetuity period (not exceeding eighty years) is given by s. 1 of the Perpetuities and Accumulations Act, 1964 (44 Halsbury's Statutes (2nd Edn.) 871). Common recoveries were abolished by ss. 2–14 of the Fines and Recoveries Act, 1833, repealed as obsolete by the Law of Property (Amendment) Act, 1924, s. 10, Sched. 10.

Distinguished: *Plunket* v. *Holmes* (1661), T.Raym. 28. Considered: *Petty* v. *Goddard* (1662), O.Bridg. 35; *Gardner* v. *Sheldon* (1671), 2 Keb. 781; *Gibbons* v. *Summers* (1681), 3 Lev. 22. Applied: *Fairfax* v. *Heron* (1696), Prec. Ch. 67; *Barker* v. *Slater* (1697), Comb. 433. Considered: *Goodtitle d. Gurnall* v. *Wood* (1740), Wills, 211; *Gulliver* v. *Vaux* (1746), 8 De G.M. & G. 167 a. Applied: *Porter* v. *Bradley* (1789), 3 Term Rep. 143; *Roe d. Sheers* v. *Jeffery* (1798), 7 Term Rep. 589; *Doe d. Bamfield* v. *Wetton* (1800), 2 Bos. & P. 324. Considered: *Doe d. Cadogan* v. *Ewart* (1838), 7 Ad. & El. 636. Explained: *Doe d. Todd* v. *Duesbury* (1841), 8 M. & W. 514. Referred to: *Snowe* v. *Cuttler* (1664), 1 Lev. 135; *Smith* v. *Farnaby* (1666), Cart 52; *Wright* v. *Hicocks* (1667), 2 Keb. 261; *Fry's (The Lady Anne) Case* (1662), 1 Vent. 199; *Brown and Benson* v. *Hudson* (1673), 3 Keb. 287; *Holmes* v. *Meynel* (1681), T.Raym. 452; *Howard* v. *Duke of Norfolk* (1681), 2 Freem. Ch. 80; *Davis* v. *Speed* (1693), Skin. 351; *Luddington* v. *Kine* (1696), 1 Ld. Raym. 203; *Scattergood* v. *Edge* (1699), 12 Mod. Rep. 278; *Anon.* (1704), 6 Mod. Rep. 241; *Roe* v. *Fludd* (1729), Fortes. Rep. 184; *Gurnett* v. *Wood* (1739), 7 Mod. Rep. 302; *Gulliver* v. *Wickett* (1745), 1 Wils. 105; *Carr* v. *Singer* (1750), 2 Ves. Sen. 603; *Barlow* v. *Salter* (1810), 17 Ves. 479; *Campbell* v.

Harding (1831), 2 Russ. & M. 390; *Hardcastle* v. *Dennison* (1861), 10 C.B.N.S. 606.

As to interests in real estate, executory devises, being subject to the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 291; and for cases, see 37 DIGEST (Repl.) 75. As to executory interests, see 32 HALSBURY'S LAWS (3rd Edn.) 320. As to conditional gifts in wills, limitations on failure of issue, see 39 HALSBURY'S LAWS (3rd Edn.) 1152 et seq.; and for cases, see 49 DIGEST (Repl.) 1084.

Cases referred to:

(1) *Beresford's Case* (1607), 7 Co. Rep. 41 a.; 77 E.R. 471; 38 Digest (Repl.) 845, *591.*

(2) *Lampet's Case* (1612), 10 Co. Rep. 46 b.; 77 E.R. 994; 38 Digest (Repl.) 873, *860.*

(3) *Clache's Case* (1572), 3 Dyer, 330 b.; 73 E.R. 747; 49 Digest (Repl.) 1229, *11316.*

(4) *Boraston's Case* (1587), ante, p. 377; 3 Co. Rep. 16 a.; 76 E.R. 664; 49 Digest (Repl.) 972, *9142.*

(5) *Wellock* v. *Hammond* (1590), cited 3 Co. Rep. at p. 20 b.; Cro. Eliz. 204.

(6) *Fulmerston* v. *Steward* (1596), cited Cro. Jac. at p. 592; 2 Roll. Rep. 218.

(7) *Capel's Case*, *Hunt* v. *Gateley* (1593), 1 Co. Rep. 54 a.; Moore, K.B. 154; Poph. 5; 76 E.R. 121, Ex. Ch.; 38 Digest (Repl.) 858, *709.*

Action for replevin for taking three cows at Rowdham. The defendant justified for damage feasant as in his freehold. The plaintiff traversed the freehold; and, thereupon, a special verdict was found on the issue.

William Brown, father to the defendant, being seised of this land in fee, having issue the defendant his son and heir, Thomas Brown his second son, and Richard Brown a third son, by his will in writing devised this land to

> "Thomas his son and his heirs for ever, paying to his brother Richard £20 at the age of twenty-one years; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him and his heirs and assigns for ever, paying the said sum as Thomas should have paid."

Thomas entered, and suffered a common recovery with a single voucher, to the use of himself and his heirs, and afterwards devised it to the wife of Edward Pells the plaintiff and her heirs. He died without issue, leaving the said William Brown, who entered upon Edward Pells, and took the distress.

This case was twice argued at the Bar, and afterwards at the Bench; and the matter was divided into three points. First, whether Thomas had an estate in fee, or in fee tail only. Secondly, admitting that Thomas had a fee, whether this limitation of the fee to William was good so as to limit a fee upon a fee. Thirdly, if Thomas had a fee, and William only a possibility to have a fee, whether this recovery would bar William, or was such an estate as could not be extirpated by recovery or otherwise.

SIR HENRY MONTAGU, C.J., DODERIDGE, HOUGHTON and **CHAMBERLAYNE, JJ.,** resolved, as to the first point, that it is not an estate tail in Thomas, but an estate in fee, for it is devised to him and his heirs for ever and also paying to Richard £20; both which clauses show that he intended a fee to him. The clause, "if he died without issue," is not absolute and indefinite, whensoever he died without issue, but it is with a contingency: "if he died without issue, living William," for he might survive William, or have issue alive at the time of his death, living William; in which cases William should never have it, but is only to have it if Thomas died without issue, living William. Vide Y.B. 19 Hen. 6, pl. 74; Y.B. 12 Edw. 3, pl. 8; *Beresford's Case* (1); *Lampet's Case* (2). Therefore, it is not like the cases cited on the other part, Y.B. 5 Hen. 5, pl. 6; 37 Ass. pl. 15 and 16, and *Clache's Case* (3), for it is an exposition of his intent what issue should have it, viz., of his body; and whensoever he died without issue, the land should remain,

A etc., but here it is a conditional limitation to another, if such a thing happen; and, therefore, they all relied upon 2 DYER, 124 [pl. 38] and 3 DYER, 354 [pl. 33], which are all one with this case.

As to the second point, they all agreed that this is a good limitation of the fee to William by way of that contingency, not by way of immediate remainder, for they all agreed it cannot be by remainder: as if one devised land to one and his B heirs, and if he die without heir, that it shall remain to another, it is void and repugnant to the estate; for one fee cannot be in remainder after another, for the law does not expect the determination of a fee by his dying without heirs, and, therefore, cannot appoint a remainder to begin upon determination thereof, as Y.B. 19 Hen. 8, pl. 8, and 1 DYER, 33 [pl. 12], but by way of contingency, and by way of executory devise to another to determine the one estate and limit it to C another upon an act to be performed, or in failure of performance thereof, etc., for the one may be and has always been allowed: as devise of his land to his executors to sell, if his heir fail of payment of such a sum at such a day, this is an executory devise. So the case cited in *Boraston's Case* (4), of *Wellock* v. *Hammond* (5), where a devise was to the eldest son and heirs, paying such a sum to the younger sons, otherwise that the land should be to him and his heirs, is a D good executory devise. A precedent was shown, Trinity Term, 38 Eliz. Roll. 867, *Fulmerston* v. *Steward* (6), where upon special verdict it was adjudged, that whereas Sir Richard Fulmerston devised to Sir Edward Cleere and Frances his wife, daughter and heir of Sir Richard Fulmerston, certain lands in Elden in the county of Norfolk, to them and the heirs of Sir Edward Cleere, on condition that they should assure lands in such places to his executors and their heirs to perform his E will; and if he failed, then he devised the lands in Elden to his executors and their heirs. It was adjudged to be a good limitation, and no condition, for if it should be a condition, it should be destroyed by the descent to the heir: but it is a limitation, and as an executory devise to his executors, who for non-performance of the acts entered and sold; and adjudged good. So here, etc., for it is a good executory devise upon this limitation. And **DODERIDGE, J.**, said that the F opinion in 1 Dyer, 33 [pl. 12] was that such a limitation in fee upon an estate in fee cannot be, and it had been often adjudged contrary thereto.

As to devise to the third point, **DODERIDGE, J.**, held that this recovery should bar William, for he had but a possibility to have a fee, and quasi a contingent estate, which is destroyed by this recovery before it came in esse; for otherwise it would be a mischievous kind of perpetuity which could not by any means be de- G stroyed. Although it was objected that a recovery should not bar but where a recovery in value extends thereto, as appears by *Capel's Case* (7), where a rent-charge granted by him in remainder was bound, yet he held that this recovery destroying the immediate estate all contingencies and dependencies thereupon are bound, and a recovery should bind everyone who cannot falsify it. Here he who has this possibility cannot falsify it, therefore, he shall be bound H thereby. But all the other justices were herein against him, that this recovery should not bind, for he who suffered the recovery had a fee and William Brown had but a possibility, if he survived Thomas; and Thomas dying without issue in his life, no recovery in value shall extend thereto, unless he had been party by way of vouchee (and then it should; for by entering into the warranty he gave all his possibility. Therefore, they agreed to the case which counsel for the defen- I dant cited to be adjudged in 34 Eliz. [see Palm. 135], where a mortgagee suffers a recovery, it should not bind the mortgagor; but if he had been party by way of voucher, it was otherwise. Here is not any estate depending upon the estate of Thomas Bray, but a collateral and mere possibility, which should not be touched by a recovery. If such recovery should be allowed, then if a man should devise that his heirs should make such a payment to his younger sons, or to his executors, otherwise the land should be to them, if the heir by recovery might avoid it, it would be very mischievous, and might frustrate all devises; and there is no such

mischief that it should maintain perpetuities, for it is but in a particular case and upon a mere contingency, which peradventure never may happen, and may be avoided by joining him in the recovery who had such a contingency. On the other part, it would be far more, and a greater mischief, that all executory devises should by such means be destroyed. **HOUGHTON, J.,** in his argument, put this case. If a man gives or devises lands to one and his heirs as long as J. S. had issue of his body, he shall not by recovery bind him who made this gift without making him a party by way of vouchee, for a recovery against the tenant in fee simple never shall bind a collateral interest, title, or possibility, as a condition, or covenant, or the like. Wherefore they all, except **DODERIDGE, J.,** held that this recovery was no bar.

Then **DODERIDGE, J.,** took exception to the verdict, that the lands were not found to be held in soccage, for otherwise it might be intended to be held in knight's service; and so it should be intended; and then the devise is void for a third part. So it was resolved in 24 Eliz. Dyer [see 2 Roll. Rep. at pp. 223, 224], that it ought to be shown that the land was held in soccage, otherwise the devise was not good for the entire. But all the justices held it not to be material, as this case is, for the issue is whether it was the freehold of William Brown, who is found to be heir to the devisor. Then although it was admitted that the lands were held by knight's service, yet he had the entire (viz., two parts by the devise, and a third part by descent): wherefore the tenure is not material, as this case is; and it was adjudged for the defendant.

Judgment for defendant.

LEWIS BOWLES' CASE

[Court of King's Bench (Sir Edward Coke, C.J., and other judges), Easter Term, 1615]

[Reported 11 Co. Rep. 79b; 1 Roll. Rep. 177; 77 E.R. 1252]

Settled Land—Tenant for life—Right to timber—Timber of building blown down by wind—Use for re-building.

Property was settled upon T. and A. for their lives without impeachment for waste, with remainder to their issue male in tail, with remainders over. After the death of T., and while A. was still alive, a barn on the property was blown down by the wind.

Held: where a tenant for life or years held without impeachment for waste and a building was blown down by the wind, the timber belonged to the tenant; where the tenant for life or years was not exempted from such liability, the lessor had the general ownership of the houses and timber trees, but the tenant had a special interest in them and might use the timber for rebuilding a building which was blown down.

Notes. As to liability for waste, see now the law of Property Act, 1925, s. 135: 20 Halsbury's Statutes (2nd Edn.) 713.

Considered: *Abraham* v. *Bubb* (1680), Freem. Ch. 53; *Williams* v. *Williams* (1808), 15 Ves. 419; *Boydell* v. *McMichael* (1834), 3 Tyr. 974. Referred to: *Secheverel* v. *Dale* (1627), Poph. 193; *Berry* v. *Heard* (1632), Cro. Car. 242; *Harris* v. *Belchey* (1679), 2 Show. 91; *Carrick* v. *Errington* (1726), Mos. 8; *Aston* v. *Aston* (1749), 1 Ves. Sen. 264; *Garth* v. *Cotton* (1753), 3 Atk. 751; *A.-G.* v. *Marlborough* (1818), 3 Madd. 498; *Tooker* v. *Annesley* (1832), 5 Sim. 235; *Waldo* v. *Waldo*

(1841), 12 Sim. 107; *Gent* v. *Harrison* (1859), John. 517; *Leigh* v. *Dickenson* (1883), 12 Q.B.D. 194.

As to waste, see 34 HALSBURY'S LAWS (3rd Edn.) 649 et seq.; and for cases see 40 DIGEST (Repl.) 697.

Action upon the case brought by Lewis Bowles against Haseldine Bury the younger, which began in the King's Bench. The declaration stated that the plaintiff was possessed of thirty cart loads of timber, and lost them, and that they came into the hands of the defendant, who converted them to his own use. Upon not guilty pleaded, the jury gave a special verdict to this effect. Thomas Bowles, grandfather of the said Lewis, was seised of the manor of Norton-Bury in the said county in fee, and, by indenture between him on the one part and William Hide and Leonard Hide of the other part, in consideration of a marriage to be had between the said Thomas Bowles and Anne, daughter of William Hide, etc., covenanted that after the marriage had and solemnised, that Thomas, his heirs and assigns, would stand seised of the manor of Norton-Bury, to the use of Thomas and Anne, for the term of their lives, without impeachment of waste, and after their deaths, to the use of their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue male, etc., and for want of such issue, to the use of the heirs males of the body of Thomas and Anne lawfully begotten; and for want of such issue, to the use of Thomas Bowles, son and heir apparent of Thomas Bowles the grandfather, and the heirs males of his body issuing, and for want of such issue, to the use of the heirs of the body of Thomas and Anne lawfully issuing. The marriage was solemnised accordingly, and Thomas the grandfather, and Anne, had issue John. Afterwards Thomas the grandfather died without any issue on the body of Anne, but John; after whose death Anne entered into the manor, and was thereof seised, with the remainder over, as aforesaid, and afterwards John Bowles died, and afterwards Thomas the son conveyed by fine his remainder to the use of Lewis Bowles the plaintiff, and Diana his wife, and the heirs males of his body. Anne being so seised of the manor, with the remainder over as aforesaid, a barn, parcel of the manor was blown down by a storm and the thirty cart loads of timber mentioned in the declaration were parcel of the barn, and the timber was sound and fit for building, wherefore the defendant, as servant of Anne, and by her command took the timber, and carried it out of the limits of the manor to Radial, in the same county. Afterwards Anne made her last will, and thereof made Robert Osborne and Leonard Hide, Knts., her executors, and died, after whose death the plaintiff seized the timber, and afterwards the defendant, by the command of the executors, converted it to his use. If on the whole matter the defendant was guilty or not, the jury prayed the opinion of the court.

Two questions were moved: (i) If on the whole matter the wife should be tenant in tail after possibility, or that she should have the privilege of a tenant in tail after possibility, sc. to do waste, etc. (ii) Admitting that she should not have the privilege, etc., if the clause of "without impeachment of waste," shall give her property in the timber so blown down by the wind.

The following is a summary of the report insofar as it relates to the second of these questions.

If a tenant for life or for years fells timber, or pulls down the houses, the lessor shall have the timber. It is apparent in reason that the lessee had them but as things annexed to the soil, and, therefore, it would be absurd in reason, that when by his act and wrong he severs them from the land, that he should gain a greater property in them than he had by the demise. It is without question that the lessor has the general ownership and right of inheritance in the houses and timber trees, and the lessee has but a particular interest, and, therefore, be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by any other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership, and because they were his inheritance.

If a house falls down (per vim venti in the time of such lessee for life or for years, or in the time of the tenant in dower, or tenant by the courtesy, etc., that such particular tenants have a special property in the timber to rebuild the like house as the other was for his habitation: as if they fell a tree for reparation, they have a special property to that purpose in it. But the said particular tenants cannot give or sell the tree so felled, for the general property is in the lessor.

The clause of "without impeachment of waste" gives a power to the lessee, which will produce an interest in him if he executes his power during the privity of his estate. The continual and constant opinion of all ages is that those words gave power to the lessee to do waste to his own house, and it would be dangerous now to recede from it. A tenant for life without impeachment of waste has as great power to do waste and to convert it at his own pleasure, as a tenant in tail has. These words "without impeachment of waste," are sufficient words to give tenant for life such power. The said woman by force of the said clause of "without impeachment of waste," had such power and privilege, that though in the case at Bar no waste be done, because the house was blown down per vim venti without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind; and when they are severed from the inheritance either by the act of the party, or of the law, and become chattels, the whole property of them is in the tenant for life by force of the said clause of "without impeachment of waste."

ROOK *v.* WARTH

[Lord Chancellor's Court (Lord Hardwicke, L.C.), May 23, 1750]

[Reported 1 Ves. Sen. 460; 27 E.R. 1142]

Landlord and Tenant—Waste—House destroyed by fire and not repaired.

Per Lord Hardwicke, L.C.: Unless it is a burning by lightning or act of God, the destruction of a house by fire, unless in convenient time repaired, is waste. So as between landlord and tenant for years, though no covenant to repair or rebuild, the tenant is subject to waste in general, and if the house is burnt by fire he must rebuild it.

Infant—Conversion of property—Equitable doctrine—Refusal to allow conversion.

Per Lord Hardwicke, L.C.: [An infant's] estate ought to be taken care of and applied according to the nature of it. The court will always take care it shall be so and will not suffer his real property to be changed into personal during his infancy or his personal into real in order that persons who are to come into succession may find the property in the same state without being altered by those who had not power to alter it . . . and with regard to money directed to be laid out in land, which the infant might have elected to take as money, if he lived to full age.

Notes. By s. 83 of the Fires Prevention (Metropolis) Act, 1774 (13 Halsbury's Statutes (2nd Edn.) 9) there is a statutory duty on the insurance company to reinstate the house or building lost or damaged by fire, on the request of any person interested in or entitled to it. By s. 135 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 713) provision is made for the liability of a tenant for life for equitable waste.

Considered: *Warwicker* v. *Bretnall* (1882), 23 Ch.D. 188.

As to conversion of infant's property, see 14 HALSBURY'S LAWS (3rd Edn.) 580; and for cases see 20 DIGEST (Repl.) 418. As to fire insurance of separate interests of persons interested in the same property, see 22 HALSBURY'S LAWS (3rd Edn.) 313; and for cases see 29 DIGEST (Repl.) 493. As to tenant's liability to rebuild after fire, see 23 HALSBURY'S LAWS (3rd Edn.) 563; and for cases see 31 DIGEST (Repl.) 406. As to tenant's liability for waste, see 23 HALSBURY'S LAWS (3rd Edn.) 568 et seq.; and for cases see 31 DIGEST (Repl.) 396. As to fire insurance by tenant for life, see 34 HALSBURY'S LAWS (3rd Edn.) 527; and for cases see 40 DIGEST (Repl.) 741 et seq.

Case referred to:

(1) *Holt* v. *Holt* (1694), 2 Vern. 322; 1 Eq. Cas. Abr. 274, pl. 11; 23 E.R. 808; 24 Digest (Repl.) 673, *6621*.

Bill in Equity concerning right to money in the hands of the guardian of a tenant in tail who died under age.

A copyhold estate entailed, consisting principally of a house, having been burnt down, the sum of £96 was collected on briefs towards the rebuilding, and paid by the trustees of the charity into the hands of the guardian of tenant in tail who was an infant, and died under age, without its having been so applied. A question arose between the personal representative of the infant and his aunts, who claimed as issue in tail under the settlement of the real estate, in place of which this money came, and brought this bill for that purpose.

LORD HARDWICKE, L.C.—This is certainly a new case of which there is no precedent, yet in general there are authorities the reason of which governs this. I was at first a little alarmed by this bill because what I generally go on is to discharge bills relating to money given in this kind of charity collected on briefs. If the money had been in the hands of the trustees, I would have dismissed the bill, and they should have come to this court by petition. But that is not the case, the money having been paid by the trustees for the benefit of the person then taken to be the sufferer so that it is in the hands of his guardian, and in the same state as if a particular sum had been raised or given by relations or friends of the infant, and to come in lieu of that loss he sustained, and which would be so applied. It is admitted the only loss sustained by the infant was from burning down the house. Had it been a loss complicated, partly consisting in the burning the house and destroying the goods and other property of the infant, it would have been very difficult to have made a division and distribution of the money, and I should have endeavoured to have avoided entering into that consideration. But that is not the case.

There are two principal grounds for plaintiffs: (i) that this was an estate tail of one dying during infancy; and (ii) that it was copyhold.

As to the first, supposing this had been the estate of one of full age seised in fee and the money had been paid by the trustees to tenant in fee himself, or to someone for his benefit, I should be of opinion that on his death his heir-at-law could have no claim on that money, unless there was some act, declaration, or apparent circumstance arising from himself to appropriate this money to rebuilding the house. So if he had been tenant in tail of full age who had spent or mixed the money with his other personal estate without appropriation to the purpose of rebuilding, I should have thought the issue in tail would have had no right to come to this court to have it so applied. Therefore, it is rightly compared to the case of money paid on insurance of a house from fire. The insurance money was a satisfaction for the loss, and if the tenant in tail or in fee of full age had died, before the money was paid by the insurance offices, the heir-at-law or issue in tail would have a considerable right to come into this court to have the premises so destroyed, repaired or rebuilt. That case of the insurance might be compared to cases where the tenant in fee enters into articles to build a house and before it is built the party dies. The court has decreed [see *Holt* v. *Holt* (1)] as between

executor and heir-at-law that the articles should be carried into execution and the house rebuilt for the benefit of the heir-at-law, it partaking of the nature of the realty. There may be cases where the tenant in tail or fee has done an act for which he has a personal remedy only as against the workman he had contracted with, that should be considered as so annexed to the realty as that the heir-at-law should have the benefit of the contract. So would it be in the case of one of full age. But this is a case of infancy, which operates in this manner. He was under guardianship, and his estate ought to be taken care of and applied according to the nature of it, and the court will always take care it shall be so, and will not suffer his real property to be changed into personal during his infancy, or his personal into real, in order that the persons who are to come into succession may find the property in the same state without being altered by those who had not power to alter it. Of this there are several cases with regard to the timber part of the inheritance, and with regard to money directed to be laid out in land, which the infant might have elected to be taken as money, if he lived to full age. Then on a bill in the infant's life by his prochein amy [next friend] in his name, the court would have compelled the guardian or trustee to have laid this money out in rebuilding the house; and would not have said the money should be kept till he dies, and then it shall be mere money, and the heir-at-law shall take the premises without the application of the proper fund to put them in the condition they were. That right subsisting during his whole life, his death will not change it, but it will be bound by the same equity and under the same right.

Consider the next distinguishing reason, that this is copyhold, which greatly strengthens it. The copyhold tenant being subject to waste by the general rule of law (no custom to the contrary being shown), this might have been considered by the lord of the manor as waste; for, unless it is a burning by lightning or the act of God, the destruction of a house by fire, unless in convenient time repaired, is waste. So as between landlord and tenant for years, though no covenant to repair or rebuild, he is subject to waste in general, and if the house is burned by fire, he must rebuild. But this is stronger, for if there is any negligence in the copyhold tenant or guardian, as this is the case of an infant, the lord of the manor would have this right; which, therefore, still subsists: and it would be fatal for the tenant in tail, if he should lose his estate for want of the application of this money. This distinguishes the present case; and if it had been a question between the heir-at-law and personal representative, the heir-at-law would have this right to have the money so applied, as it stood so bound at the death of the infant: so will the issue in tail.

The only doubt I have is as to this part of the case. The whole of the loss the infant sustained is computed to £148 the loss to him during his minority, as then he could not alienate, was the loss of the profits of the estate, which must be considered as the loss of the interest of that money, and a personal loss to himself. Then, will the issue in tail be entitled to have the whole laid out in rebuilding the premises, or ought not the infant tenant in tail to be allowed so much out of it, as the interest of the whole £148 would amount to during his life. It was agreed afterwards that the plaintiffs should pay £80 as a reasonable proportion of the £96 to the rebuilding under the circumstances of the case: but without costs on either side. As the plaintiffs were tenants in tail of full age, the court would not decree them to lay it out; they might do as they thought fit.

Order accordingly.

HARGRAVE *v.* LE BRETON

[Court of King's Bench (Lord Mansfield, C.J., and other judges), May 6, 1769]

[Reported 4 Burr. 2422; 98 E.R. 269]

Slander of Title—Malice—Need for malice to ground action.

To maintain an action for slander of title, there must be malice either express or implied, and the words spoken must go to defeat the plaintiff's title.

Notes. An action for slander of title, etc., will in certain cases lie without proof of special damage: see s. 3 of the Defamation Act, 1952 (32 Halsbury's Statutes (2nd Edn.) 400).

Considered: *Robertson* v. *McDougall* (1828), 4 Bing. 670. Distinguished: *Blackham* v. *Pugh* (1846), 2 C.B. 611. Referred to: *Smith* v. *Spooner* (1810), 3 Taunt. 246; *Bromage* v. *Prosser* (1825), 4 B. & C. 247; *Gutsole* v. *Mathers* (1836), Tyr. & Gr. 694; *Ratcliffe* v. *Evans*, [1891–4] All E.R.Rep. 699.

As to slander of title, see 24 Halsbury's Laws (3rd Edn.) 125 et seq.; and for cases, see 32 Digest (Repl.) 241 et seq.

Rule Nisi obtained by the defendant to set aside a verdict for the plaintiff in an action of slander of title, and for a new trial.

Premises (which were of the value of about £1,200 and originally belonged to one John Loveday, but had been mortgaged by him to the plaintiff who had also got in a prior assignment of them) were on sale by auction for the benefit of the parties respectively interested and by their joint agreement. The auction was actually begun and some persons had bid; but at the beginning of the bidding and before it had proceeded to any considerable degree of advancement, the defendant, who was concerned as attorney for one Mr. Lee, a creditor of John Loveday, came into the room in a great hurry and said to the company that he had bad news to tell them. Being asked what news, he answered that he was sent by a creditor of Mr. John Loveday's to acquaint them "that the said John Loveday was a bankrupt before he made the mortgage to the plaintiff; and that there was a docket made out for a commission against him; and that his name would be in the Gazette on the Saturday evening following." Whereupon, the bidding immediately ceased and the estate remained unsold, and still remained so. What the defendant thus declared was partly true and partly otherwise. It was true that he was really sent by his client Mr. Lee, who was a creditor of Loveday, on purpose to make this public declaration at the auction, of Loveday's being a bankrupt before he made the mortgage to the plaintiff; and that Mr. Lee intended to take out a commission against him. But it was not true in fact, nor did Mr. Lee, his client, give him any authority to say that there was a docket made out for a commission against him, nor, that his name would be in the Gazette on the Saturday evening following: neither was there yet any docket or commission, nor had his name yet been in the Gazette. No actual malice was either alleged or proved.

At the trial before Lord Mansfield, a verdict was given for the plaintiff with £50 damages.

Cur. adv. vult.

May 6, 1769, **LORD MANSFIELD, C.J.,** delivered the following judgment of the court: The question is whether, on the evidence, the plaintiff ought to recover against the defendant on the circumstances of this case. It is to be considered, in point of law, first, whether this action would have lain against the defendant, the attorney for the creditor, if he had only delivered the message in his client's own words, and, secondly, whether the variation he made from them will subject him to this action.

As to the first, we are all clear that it would not. He is no more liable to the action than the creditor himself would have been. He was sent by Lee, to make this declaration, and qui facit per alium, facit per se. But the plaintiff could not

have recovered against Lee; for, to maintain such an action as this is, there must be malice, either express or implied, and the words spoken must go to defeat the plaintiff's title. Whereas here is no malice, either express or implied. The words of the message sent by Lee are true and they proceed from a person called on to give notice; either to protect his own property or (what is his duty as a moral act) to save another from being cheated. Lee had notice of Loveday's bankruptcy from Bolland. Lee had an interest in the fund, and he was entitled to take out a commission against Loveday. He reads an advertisement "for the sale of Loveday's estate." He was thereby called on, in order to preserve his own interest and that of the rest of the creditors, as an honest and a prudent man to give this notice. For, if the estate had been purchased without notice of the bankruptcy, such purchaser would have been protected by a satisfied term prior to the act of bankruptcy still standing out. When an auction was advertised and was proceeding for the sale of this estate, with intent to cheat purchasers by a false title, shall not he, as an honest man, give this notice, and prevent iniquity? But here, Lee had a property of his own to secure; he was a creditor of Loveday and intended to sue out a commission.

We are clear that, under such circumstances, malice cannot be implied. No action lies for giving the true character of a servant, on application made to his former master, to inquire into his character with a view of hiring him unless there should be extraordinary circumstances of express malice. Another ground to maintain such an action as this is that it must be such a slander as goes directly to defeat the plaintiff's title. But in this case the assertion does not go to defeat the plaintiff's title.

As to the second question, whether the defendant's varying from the message he was charged with and adding more than he was commissioned to declare, or "even authorised to say in point of strict truth, it appeared that his client had told him "that he would take out a commission that night." And if he had done what he told the defendant that he would do, Loveday's name would have been in the GAZETTE on the Saturday evening following. So that there was no material variation from what he was commissioned by his client Lee to say. Nor did it make any difference with regard to the plaintiff or his title; for Loveday was then become bankrupt and liable to a commission, which commission might have been taken out upon that day and the bankrupt's name inserted in the GAZETTE of the Saturday evening following.

We are, therefore, all of opinion that there is no foundation for this verdict and that it ought to be set aside on payment of costs.

Rule absolute.

A

BEWICK *v.* WHITFIELD

[LORD CHANCELLOR'S COURT (Lord Talbot, L.C.), Easter Term, 1734]

[Reported 3 P.Wms. 267; 24 E.R. 1058]

B *Settled Land—Timber—Standing timber part of inheritance—Ownership of severed timber.*

Timber, while standing, is part of the inheritance; but whenever it is severed, either by act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance.

A. was tenant for life, remainder to B. in tail as to one moiety, remainder to C., an infant, in tail as to the other moiety, remainder over. There was C timber on the premises, greatly decaying. B. brought a bill praying that the decaying timber might be cut down and sold, and the money divided between him and C. A. insisted on having part of the money.

Held: (i) A. was not to have any share of the money arising by the sale of the timber, but enough must be left on the estate for repairs and whatever damage was done on the premises must be made good to A.; (ii) decaying D trees, if for the defence or shelter of the house or for ornament, must not be cut down; (iii) C.'s moiety of the money must be put out for his benefit.

Notes. Considered: *Garth* v. *Cotton* (1750), 1 Ves. Sen. 546; *Tooker* v. *Annesley* (1832), 5 Sim. 235; *Re Barrington, Gamlen* v. *Lyon*, [1886–90] All E.R.Rep. 679. Referred to: *Lee* v. *Alston* (1789), 3 Bro.C.C. 37; *Honey* v. *Honey* (1824), 1 E Sim. & St. 568; *Segram* v. *Knight* (1867), 2 Ch. App. 628; *Re Williams' Settlement, Williams Wyn* v. *Williams*, [1922] 2 Ch. 750; *Re Timber Regulations, Refund of Dues under*, [1935] A.C. 184.

As to liability of tenant for life for waste, see 34 HALSBURY'S LAWS (3rd Edn.) 649 et seq.; and for cases, see 2 DIGEST (Repl.) 104 et seq.

Bill by the remainderman in tail of an estate praying that decaying timber on F the estate might be cut down and that he and the other remainderman might have the money arising from the sale.

A. was tenant for life, remainder to the plaintiff B. in tail as to one moiety, remainder as to the other moiety to C., an infant, in tail, remainder over. There was timber on the premises greatly decaying, whereupon B., the remainderman, brought a bill praying that the timber that was decaying might be cut down and G that he, together with the other remainderman, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

LORD TALBOT, L.C.—The timber, while standing, is part of the inheritance; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance, H whether in fee or in tail, who may bring trover for it. This was so decreed on occasion of the great windfall of timber on the Cavendish estate.

Secondly, as to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough on the estate for that purpose, and whatever damage is done to the tenant for life on the premises I by him held for life, the same ought to be made good to him.

Thirdly, with regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance that it should be cut down, otherwise it would become of no value; but this shall be done with the approbation of the Master. And trees though decaying, if for the defence and shelter of the house or for ornament, shall not be cut down. B., who is the tenant in tail (and of age) of one moiety, is to have a moiety of the clear money subject to such deductions as aforesaid; the other moiety belonging to the infant must be put out for the benefit of the infant on government or real securities, to be approved of by the Master.

MACKALLEY'S CASE

[COURT OF EXCHEQUER CHAMBER: All the Judges of England, 1611]

[Reported 9 Co. Rep. 61 b, 65 a; Cro. Jac. 279; Jenk. 291; 77 E.R. 824]

Sunday—Judicial act—Ministerial act—Validity if done on Sunday.
Arrest—Arrest on Sunday—Arrest at night—Validity.

No judicial act may be done on a Sunday, but ministerial acts may be done on that day, "for otherwise peradventure they can never be executed and God permits things of necessity to be done on that day." Accordingly, an arrest on a Sunday is good, as also is an arrest during the night.

Criminal Law—Murder—Charge against several defendants—Evidence that fatal blow struck by one defendant—Variation from indictment.

If A., B. and C. are indicted for killing J.S., it being alleged that A. struck him and that the others were present, procuring, abetting, etc., and on the evidence it appears that B. struck J.S. and that A. and C. were present procuring, etc., it is sufficient to maintain the indictment, for the evidence agrees with the effect of the indictment and so the variance from the circumstances of the indictment is not material.

Criminal Law—Manslaughter—Reduction of murder to manslaughter—Validity of conviction.

If one is indicted for the murder of another upon malice prepense and he is found guilty of manslaughter, he shall have judgment on this verdict, for the killing is the substance and the malice prepense the manner of it.

Notes. No writ, process, warrant, order, judgment or decree in civil proceedings may be served or executed on Sunday: Sunday Observance Act, 1677, s. 6 (5 HALSBURY'S STATUTES (2nd Edn.), s. 6), orders for the protection of children under the Children Act, 1958, s. 7 (38 STATUTES, 527) and the Adoption Act, 1958, s. 43 (38 STATUTES, 572) being now excepted from this provision.

Considered: *Woolmington* v. *D.P.P.*, [1935] All E.R.Rep. 1; *Connelly* v. *D.P.P.*, [1964] 2 All E.R. 401. Referred to: *Heydon's Case* (1613), 11 Co. Rep. 5 a; *R.* v. *Cary* (1616), 3 Bulst. 206; *Hodges* v. *Marks* (1618), Cro. Jac. 485; *Waite* v. *Stoke Hundred* (1618), Cro. Jac. 496; *R.* v. *Plummer* (1701), Kel. 107; *Harvey* v. *Broad* (1704), 2 Salk. 626; *R.* v. *Tooley* (1709), 11 Mod. Rep. 242; *R.* v. *Huggins* (1730), 2 Ld. Raym. 1574; *Smith* v. *Bouchier* (1734), Cunn. 89; *Swann* v. *Broome* (1764), 3 Burr. 1595; *R.* v. *Davies* (1861), 8 Cox, C.C. 486; *Galliard* v. *Laxton* (1862), 2 B. & S. 363; *Fisher* v. *Oldham Corpn.*, [1930] All E.R.Rep. 96; *Diamond* v. *Minter*, [1941] 1 All E.R. 390; *Christie* v. *Leachinsky*, [1947] 1 All E.R. 567.

As to arrest, murder and manslaughter, see 10 HALSBURY'S LAWS (3rd Edn.) 335 et seq., 704 et seq. For cases, see 14 DIGEST (Repl.) 184 et seq., 15 DIGEST (Repl.) 930 et seq.

Cases referred to:

(1) *Semayne's Case* (1604), ante, p. 62; 5 Co. Rep. 91 a; 77 E.R. 194; 15 Digest (Repl.) 978, *9523*.

(2) *Heydon's Case* (1586), 4 Co. Rep. 41 a; 76 E.R. 985; 14 Digest (Repl.) 105, *686*.

(3) *Countess of Rutland's Case* (1605), 6 Co. Rep. 52 b; Moore, K.B. 765; 77 E.R. 332; 21 Digest (Repl.) 675, *1639*.

By the King's Command all the judges of England were ordered to meet together to resolve what the law was in a case where the defendant, John Mackalley, had been indicted for the murder of one Fells, a serjeant of the mace, and the jury had returned a special verdict. Accordingly all the judges of England and barons of the Exchequer met together at the beginning of Hilary Term, 1611, and heard learned counsel argue on the special verdict, as well of the prisoner as of the King.

Serjeant Harris, the younger, *Anthony Diot* and *Randall Crewe* for the prisoner. *Yelverton*, *Walters* and *Coventry* for the King.

Divers exceptions were taken to the indictment and to the verdict also. First, against the indictment five exceptions were moved. (1) Because it appears that the arrest was tortious, and by consequence the killing of the serjeant could not be murder, but manslaughter. They argued that the arrest alleged in the indictment was tortious because it was made in the night, that is to say, on Nov. 18 between the hours of 5 and 6 p.m., which appears to the court to be in the night. The night is a time of rest and repose and not to arrest any by his body, for thereof would ensue (as in hoc casu accidit) bloodshed, for the officer and minister of justice cannot have such assistance, nor can the peace be so well kept in the night, that is to say, in tenebris, as in the day, in aperta luce. The prisoner cannot know the officer or minister of justice in the night, nor can he so soon find sureties for his appearance in the night and thereby avoid his imprisonment as he may in the day. Counsel cited Y.B. 11 Hen. 7, 5 A., that the lord shall not distrain for his rent or services in the night. But it was answered by counsel for the King, and in the end resolved by all the judges and barons of the Exchequer, that the arrest in the night is lawful as well at the suit of a subject as at the King's suit. The officer or minister of justice ought to arrest a man when he can find him, for otherwise perhaps he will never arrest him. If the officer does not arrest him when he finds him, and may arrest him, the plaintiff shall have an action upon his case, and recover all his loss in damages. It is like the case of distress for damage feasant for which one may distrain in the night, for otherwise perhaps he will never distrain the cattle, for they may be taken or escape out, and then they cannot be distrained. But in case of rent-service it is otherwise, for the law intends that the tenant will be all the day attendant upon the land to pay his rent, but he is not compellable to attend in the night: vide YEAR BOOKS 11 Hen. 7, 5 A.; 10 Edw. 3, 21 B.; 12 Edw. 3, Distress 17; and no inconvenience will ensue upon it, for, although he cannot see the officer, yet when he hears him say: "I arrest you in the King's name," he ought to obey him, and, if the officer has not a lawful warrant, he shall have his action of false imprisonment. As to the finding of sureties, the law is that he ought to remain in prison till he finds sureties, be it in the day, or in the night. But great inconvenience will ensue on the other side if those who are indebted to others shall go at their pleasure in the night without danger of arrest, for then they would become night walkers and turn the day into night in despight of their creditors, and as the officer or minister of justice may, by force of warrant directed to him, arrest any at the King's suit either for felony or other crime in the night, so may he do at a subject's suit. The King has no more prerogative as to the time to make an arrest than a subject, for the arrest is to no other intent than to bring the party to justice, and it appears by the opinion of the Court of King's Bench in *Semayne's Case* (1) that the sheriff may arrest in the night, as well at the suit of a subject as at the King's suit. And in *Heydon's Case* (2) it is resolved that if one kills a watchman in execution of his office, it is murder, and yet that is done in the night, and, if an affray be made in the night, and the constable, or any other, who comes to aid him to keep the peace, be killed, it is murder, for when the constable commands them in the King's name to keep the peace, although they cannot discern or know him to be a constable, yet at their peril they ought to obey him. It was also resolved, that although in truth between five and six of the clock in November is part of the night, yet the court is not bound ex officio to take cognisance of it, no more than in the case of burglary, without the words "in nocte ejusdem diei," or "noctanter."

(2) It was objected that Sunday is not dies juridicus, and, therefore, no arrest can be made thereon, but it is the sabbath, and, therefore, thereon everyone ought to abstain from secular affairs for the better worship and service of God in spirit and truth. As to that it was answered and resolved that no judicial act ought to be done on that day, but ministerial acts may be lawfully executed on the Sunday,

for otherwise peradventure they can never be executed and God permits things of necessity to be done that day. And Christ says in the gospel: "Bonum est benefacere in Sabbatho."

(3) Another exception was taken, because it is said in the beginning of the indictment, in curia dicti Dom' Reg' in computatorio suo, scituat' in parochia Sanctæ Michaelis, in Wood Street, London, and did not show in what ward the said parish was, et non allocatur, for it is held in Y.B. 7 Hen. 6, 36 B. that every ward in London is a hundred in a county and every parish in London is as a town in a hundred, and it is not necessary to declare in what hundred a town is no more than in what ward a parish is, but the same is commonly added because there are divers parishes in London of one and the same name and the ward is added to make a distinction of one parish from another. Wherefore it was resolved that in the case at Bar the indictment was sufficient notwithstanding the omission of the ward, for it does not appear to us that there is any other parish of that name, and this parish is particularly described, viz., in parochia Sancti Michael' in Wood Street, London, and therewith agrees Y.B. 7 Hen. 6, 36 B., for a bill was awarded good in parochia Sancti Laurentii in Judaismo, omitting the ward.

(4) It was excepted that it did not appear in what parish the sheriff commanded Fells, the serjeant, to arrest the defendant. That was disallowed by all the justices, for the words of the indictment are: "taliter in eadem curia process. fuit, etc.," and "eadem curia" fully demonstrates that the warrant was made at the same court mentioned before, and that was expressly alleged to be held "in parochia Sancti Michaelis, etc."

(5) It was excepted against the indictment, viz., that the precept was to arrest the defendant si inventus foret infra libertates civitatis præd' and the indictment is quod in parochia S. Martini Bowyer Rowe in warda de Farringdon infra Londinum præd' the serjeant arrested him, and so he has not pursued the precept, for the precept is infra libertates London. Notwithstanding that the indictment was resolved to be good, for the said parish and ward in London shall be intended to be within the liberty of London, for these words "liberties of London" are more spacious than London and include in them the city of London itself.

Nine exceptions were taken to the verdict. There is a material variance between the indictment and the verdict, for the indictment supposes that Richard Pyot, sheriff of London, upon a plaint entered made a precept to the said Fells, serjeant-at-mace, to arrest Murray, the defendant [another person charged with Mackalley], and by the verdict it appears that there was not any such precept made, but that by the custom of London, after the plaint entered, any serjeant ex officio at the request of the plaintiff may arrest the defendant absque aliquo præcepto ore tenus, vel aliter, so that, the indictment being special, to make this offence murder by construction of law upon the special matter without any malice prepense ought to be pursued and proved in evidence, which is not done in this case, for the jury have not found the said special matter, but the contrary. Because the jurors have not found the special matter contained in the indictment, but other matter, judgment cannot be given against the prisoner upon this indictment. To which it was answered, and in the end resolved, that there was sufficient matter in the verdict pursuant to the matter contained in the indictment, upon which the court ought to give judgment of death against the prisoner, notwithstanding the said variance, and that for two reasons.

(a) Because the warrant which the serjeant had to arrest the defendant was but circumstance which is not necessary to be precisely pursued in evidence to be found by the jury. It is sufficient if the substance of the matter be found without any such precise regard to circumstance, and, therefore, if a man is indicted that he with a dagger gave another a mortal wound upon which he died, and in evidence it is proved that he gave the wound with a sword, rapier, staff, or bill, in that case the offender ought to be found guilty, for the substance of the matter is that the party indicted has given him a mortal wound, whereof he died. The circumstance of the manner of the weapon is not material in the case of indictment, and yet

such circumstance ought not to be omitted, but some weapon ought to be mentioned in the indictment. So if A., B. and C. are indicted for killing J.S. and that A. struck him and that the others were present, procuring, abetting, etc., and upon the evidence it appears that B. struck, and that A. and C. were present, etc., in this case the indictment is not pursued in the circumstance and yet it is sufficient to maintain the indictment, for the evidence agrees with the effect of the indictment, and so the variance from the circumstance of the indictment is not material, for it shall be adjudged in law the wound (stroke) of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, etc., and had all together struck the deceased. Therewith agrees 1 Plow. Com. 98 a. So if one is indicted for the murder of another upon malice prepense and he is found guilty of manslaughter, he shall have judgment upon this verdict, for the killing is the substance, and the malice prepense the manner of it, and when the matter is found judgment shall be given thereupon although the manner is not precisely pursued. Therewith agrees 1 Plow. Com. 101 b., where it is said:

> "When the substance of the fact and the manner of the fact are put in issue together, if the jury find the substance and not the manner, judgment shall be given for the substance."

I moved all the judges and barons, if in this case of killing a minister of justice in the execution of his office the indictment might have been general, without alleging any special matter, and I conceived that it might well be, for the evidence would well maintain the indictment forasmuch as in this case the law implies malice prepense. As if a thief, who offers to rob a true man, kills him in resisting the thief, it is murder of malice prepense, or if one kills another without provocation and without any malice prepense, which can be proved, the law adjudges it murder and implies malice, for by the law of God everyone ought to be in love and charity with all men, and, therefore, when he kills one without provocation the law implies malice. In both these cases they may be indicted generally, that they killed of malice prepense, for malice implied by law, given in evidence, is sufficient to maintain the general indictment. So in the case at Bar, in this case of the serjeant, the indictment might have been general, that the defendant feloniously and of his malice prepense killed the said Fells, and the special matter might well have been given in evidence, quod fuit concessum by all the other judges and barons of the Exchequer.

(b) The second reason was because it is expressly alleged in the indictment that the said John Mackalley, eundem Richardum Fells, etc., felonice, voluntarie, et ex malitia sua præcogitata, etc., percussit et inforavit. So that besides the special matter which implies malice, it is expressly contained in the indictment that he feloniously and ex malitia præcognitata killed the said Fells, and then, although the special matter given in evidence had varied in substance from the special matter contained in the indictment, yet forasmuch as it was resolved that the indictment in this case might be general, for this cause the evidence, although it doth not agree with the special matter, yet it proves that the prisoner killed the said Fells of malice prepense, and so well maintains the indictment. That in the end was the opinion of all the justices and barons of the Exchequer.

(ii) Exception was taken to the verdict that the custom found by the jury that after the plaint entered the defendant might be arrested by his body was against law because the defendant ought to be first summoned before the precept in nature of a capias can issue, for his body shall not be arrested if he has sufficient, etc., et non allocatur, for it appears by Y.B. 21 Edw. 4, 66 b. and by common experience always daily used that after a plaint entered by the custom of London (which is established and confirmed by Parliament), the defendant may be arrested. In this case three points were resolved by all the justices and barons of the Exchequer.

(a) That although the process be apparently erroneous, yet if the minister of justice in the execution thereof be killed, it is murder, for the minister is not bound to dispute the authority of the court which awards the process, but his office

is to execute the process, and therefore, if a capias in an action of debt be awarded against a baron or other peer of the realm which is erroneous (because their bodies by law are privileged in such case), yet if the officer be killed in execution thereof, it is murder. So if a capias be awarded where a distress ought to issue and in execution thereof the officer is killed, it is murder, for as the sheriff, etc., when he is charged with an escape shall not take advantage of any error in the proceeding, so the defendant when he kills the sheriff, etc., shall not take advantage of error in the process.

(b) It was resolved that if any magistrate or minister of justice, in execution of his office, or in keeping of the peace according to the duty of his office, be killed, it is murder, for their contempt and disobedience to the King, and to the law, for it is contra potestatem Regis et legis, and, therefore, if a sheriff, justice of the peace, chief constable, petit constable, watchman, or any other minister of the King, or any who comes in their aid, be killed in doing of their office, it is murder for the cause aforesaid. When the officer or King's minister by process of law (be it erroneous or not) arrests one in the King's name or requires the breakers of the peace to keep the peace in the King's name and they notwithstanding disobey the arrest or command in the King's name and kill the officer or the King's minister, reason requires that this killing and slaying shall be an offence in the highest degree of any offence of this nature, and that is voluntary, felonious, and murder of malice prepense. A watchman by the law may arrest a night-walker: Y.B. 4 Hen. 7, 2 A., and if a watchman arrests such a one, and he kills him, it is murder: vide *Heydon's Case* (2). It is true that the life of a man is much favoured in law, but the life of the law itself (which protects all in peace and safety) ought to be more favoured, and the execution of the process of law and of the offices of conservators of the peace is the soul and life of the law, the means by which justice is administered, and the peace of the realm kept: vide Y.B. 2 Rich. 3, 21 B. If the principal be erroneously attainted, the accessory shall be put to answer, and shall not take benefit for the saving of his life of the erroneous proceeding against the principal.

(c) It was resolved that the officer or minister of the law in the execution of his office, if he be resisted or assaulted, is not bound to fly to the wall, etc. (as other subjects are) for legis minister non tenetur in executione officii fugere, seu retrocedere.

(iii) It was objected that the defendant ought not to have been arrested before the plaint was entered of record in the court before the sheriff, for this is in truth the court of record where the declaration and pleading shall be. To that it was answered and resolved by all, that after the plaint entered in the porter's book, and before the entry thereof in the court before the sheriff, the defendant may be arrested by the custom of London, and therewith agrees Y.B. 21 Edw. 4, 66 B. in the point: vide Y.B. 9 Edw. 4, 48 B.

(iv) It was objected that the said arrest found by the verdict was not lawful, for the serjeant in this case ought to have, when he arrested the defendant, showed at whose suit, out of what court, for what cause, he made the arrest, and in what court it is returnable, to the intent, that, if it be for any execution, the defendant might pay the money and free his body, and if it be upon mean process, either to agree with the party to put in bail according to the law, and to know when he shall appear, as it is resolved in the *Countess of Rutland's Case* (3). But in the case at Bar the serjeant said nothing but "I arrest you in the King's name at the suit of Mr. Radford," and so the arrest was not lawful and by consequence the offence was not murder. As to that it was answered and resolved that it is true that it is held in the *Countess of Rutland's Case* (3) that the sheriff or serjeant ought upon the arrest to show at whose suit, etc., but that is to be intended when the party arrested submits himself to the arrest and not when the party (as in this case) makes resistance and interrupts the officer. Before he could speak all his words, he was mortally wounded and murdered, in which case, the prisoner shall not take advantage of his own wrong. It was also resolved that, if one knows that the

A sheriff, etc., has process to arrest him, and the sheriff, etc., coming to arrest him, the defendant to prevent the sheriff's arresting him, kills him with a gun, or any other engine, or weapon, before any arrest made, it is murder. A fortiori, in the case at Bar, when he knew by the said words that the serjeant came to arrest him.

[The questions raised by the fifth, sixth, seventh, eighth, and ninth objections related to law now obsolete.]

B Sir Edward Coke's report concluded: Afterwards at the sessions of Newgate on May 5, 1611, the two Chief Justices openly declared the resolution of all the justices and barons of the Exchequer, to the great satisfaction and contentment of all there present. Accordingly judgment of death was given against the prisoner Mackalley, and two other persons charged with him, by the Recorder of London in the presence of the two Chief Justices. Mackalley was executed with other C prisoners at Tyburn.

D

BROOK *v.* MONTAGUE

[Court of King's Bench (Popham, C.J., and other judges), Michaelmas Term, 1605]

E [Reported Cro. Jac. 90; 79 E.R. 77]

Counsel—Privilege—Absolute privilege—Defamatory words spoken in legal and necessary exercise of profession—Duty to put forward client's case—Need to enquire into its truth.

Statements made by counsel in his professional capacity in the course of a judicial inquiry are absolutely privileged.

F **Notes.** Followed: *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. 232. Referred to: *Weston* v. *Dobniet* (1617), Cro. Jo. 432.

As to barristers' privileges, see 3 Halsbury's Laws (3rd Edn.) 28, 29, and ibid., vol. 24, p. 49 et seq.; and for cases see 32 Digest (Repl.) 122.

Action for Words, for that the defendant at such a place in Surrey spoke these G words of the plaintiff: "He was arraigned and convicted of felony, etc." The defendant pleaded that the plaintiff at another time brought false imprisonment against J.S., one of the serjeants of London, who justified by warrant from Sir Nicholas Mosely, mayor of London, for arresting him to find sureties for the good behaviour, and they were thereupon at issue and found against the plaintiff, who brought an attaint. The defendant being consiliarius et peritus in lege was H retained to be of counsel with the petty jury, and in evidence at the trial in London spoke these words in the declaration, and so justified.

Yelverton and *Sir Edward Coke* for the defendant.

Per Curiam: The justification was good, for a counsellor in law retained has a privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether I it be true or false. But it is at the peril of him who informs it, for a counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question, otherwise an action upon the case lies against him by his client, as **POPHAM, C.J.,** said. But matter not pertinent to the issue or the matter in question he need not to deliver, for he is to discern in his discretion what he is to deliver and what not, and, although it be false, he is excusable, being pertinent to the matter. But if he gives in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable, for it shall be intended as spoken maliciously and without cause, which is a good

ground for an action. So if a counsellor object matter against a widow which is slanderous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable what he delivers by information, although it be false. So here it is material evidence to prove him a person fit to be bound to his good behaviour, and in maintenance of the first verdict; therefore, his justification good.

SIR EDWARD COKE cited a case, where Parson Prick in a sermon recited a story out of FOX'S MARTYROLOGY that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, whereas in truth he never was so plagued, and was himself present at that sermon; and he thereupon brought his action upon the case for calling him a perjured person: and the defendant pleaded not guilty. And this matter being disclosed upon the evidence, WRAY, C.J., delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously; and so was found not guilty: 14 Hen. 6, pl. 14; 20 Hen. 6, pl. 34. And **POPHAM, C.J.,** affirmed it to be good law, when he delivers matter after his occasion as matter of story, and not with an intent to slander any.

Wherefore, for these reasons, it was adjudged for the defendant.

WINDHAM'S CASE

[COURT OF COMMON PLEAS]

[COURT OF QUEEN'S BENCH (Sir Christopher Wray, C.J., Gawdy, J., and other judges), Michaelmas Term, 1589]

[Reported 5 Co. Rep. 7 a; Jenk. 272; Moore, K.B. 191; 77 E.R. 58]

Deed—Construction—Grant—Construction against grantor—Lease—Construction against lessor.

In the absence of words clearly indicating the intention of the parties, the language of a deed of grant is to be construed more strongly against the grantor and more beneficially for the grantee. Accordingly, a lease is to be taken more strongly against the lessor and more beneficially for the lessee.

Notes. Considered: *Veal* v. *Roberts* (1590), Cro. Eliz. 199; *Roberts* v. *Roberts* (1613), 2 Bulst. 123. Applied: *Palmer* v. *Sparshott* (1842), 4 Man. & G. 137. Referred to: *Lovies' Case* (1614), 10 Co. Rep. 78a; *Tomson* v. *Clarke* (1620), Palm. 99; *Gilbert* v. *Witty* (1623), Cro. Jac. 655; *Cooke* v. *Gerrard* (1667), I Lev. 212; *Boswell* v. *Coats* (1671), 1 Mod. Rep. 33; *Cook* v. *Fountain* (1674), 3 Swan. 585; *Holmes* v. *Meynel* (1681), T.Raym. 452; *Trevivan* v. *Tooker* (1689), 1 Ld. Raym. 495; *Orby* v. *Mohun* (1706), 3 Rep. Ch. 102; *Withers* v. *Bircham* (1824), 3 L.J.O.S.K.B. 30.

As to the construction of a deed against the grantor, see 11 HALSBURY'S LAWS (3rd Edn.) 392–395. For cases see 17 DIGEST (Repl.) 298–303.

Cases referred to:

(1) *Browning* v. *Beston* (1555), 1 Plowd. 131; 75 E.R. 202; 31 Digest (Repl.) 241, *3751.*

(2) *Wotton* v. *Cooke* (1574), 3 Dyer, 337 b.

(3) *Chapman* v. *Dalton* (1565), 1 Plowd. 284; 75 E.R. 434; 31 Digest (Repl.) 69, *2261.*

Action of trespass brought by the plaintiff, Francis Windham, one of the justices of the Common Pleas, against the defendants, John Debney and others, for trespass done in a meadow called Sexten's Meadow at Trowse, Norfolk.

The dean and chapter of the Holy and Individed Trinity of Norwich were seised of Sexten's Meadow, and of another meadow in the town called Cheese Meadow. By indenture under their common seal they, in 1545, demised Cheese Meadow to Howlins for 40 years, and in 1557 by indenture under their common seal, they demised Sexten's Meadow to Howlins and Debney for 21 years. In 1570 the dean and chapter demised to Nicholas Manne both the meadows with a several habendum to have and to hold Cheese Meadow for 40 years after the end of the first lease thereof made, and to have and to hold Sexten's Meadow for 40 years after the first lease thereof made, with several reservations of rents. Manne assigned his interest to John Hoe, who in 1573 surrendered and took a new lease by indenture of the dean and chapter under their common seal (in which the first leases were recited) of both the meadows.

In effect [says Sir Edward Coke in his report] the case is: A man makes a lease of Sexten's Meadow to A. for 10 years, and of Cheese Meadow to B. for 20 years, and afterwards by indenture reciting the said two leases makes a lease to another of both for 40 years, to begin after the end and determination of the several leases made to A. and B. The former lease of Sexten's Meadow ends and the lease of Cheese Meadow continues, and when the later lease as to Sexten's Meadow now in question should begin, was the question. If it should not begin until the lease of Cheese Meadow be ended, then the plaintiff had entered before his time, for the former lease of Cheese Meadow has yet continuance. But if the habendum in the later lease should be taken "respectivè or distributivè," reddendo singula singulis, so that when the lease in Sexten's Meadow determines, the new term for 40 years therein should begin, then judgment ought to be given for the plaintiff.

After many arguments at Bar and Bench in the Common Pleas it was resolved and adjudged that the habendum in the later lease should be taken respectivè, that is to say, the lease of Sexten's Meadow to John Hoe for 40 years should begin immediately after the end of the first lease thereof made. For every deed shall be taken more strongly against the grantor and more beneficially for the grantee, and it is more strong against the lessor, and more beneficial for the lessee to have the lease of Sexten's Meadow to begin immediately after the expiration of the first lease made thereof than to tarry until the lease of Cheese Meadow be ended. As in 9 Edw. 4, 42 b. and 19 Hen. 6, 4 a., if I release to you all actions which I have against you and another, in this case notwithstanding the joint words, all actions which I have against you alone are released, for it shall be most beneficially for him to whom the release is made and most strongly against him who makes it, and the joint words of the parties shall be taken respectively and severally.

1. Sometimes in respect of the several interests of the grantors, as if two tenants in common or several tenants join in a grant of a rentcharge, yet in law this grant shall be several, although the words are joint, as Sir Robert Catlin, C.J., held in *Browning* v. *Beston* (1) (1 Plowd. at p. 140 b).

2. Sometimes in respect of the several interests of the grantees, etc. (16) 19 Hen. 6, 63, 64, a warranty made to two of certain lands shall enure as several warranties in respect that they are severally seised, the one of part of the lands, and the other of the residue in severalty, 6 Edw. 2, Covenant Br. 49. A joint covenant taken several in respect of the several interests of the covenantees: *Wotton* v. *Cooke* (2), a good case.

3. Sometimes in respect that the grant cannot take effect, but at several times, as 24 Edw. 3, 29 a., a remainder limited to the right of heirs of J.S. and J.N. (J.S. and J.N. being alive) in which case the words are joint, and yet the heirs shall take severally, for they shall not join in action.

4. Sometimes in respect of the incapacity and impossibility of the grantees to take jointly, as a lease made to an abbot and a secular man, or a gift to two men,

or to two women, and to the heirs of their two bodies begotten, the inheritance is several, 7 Hen. 4, 17 : vide *Chapman* v. *Dalton* (3) (1 Plowd. at p. 289). A

5. Sometimes in respect of the cause of the grant, or ratione subjectæ materiæ, as 15 Hen. 7, 14 A. One coparcener grants a rent to two other coparceners for owelty [equality] of partition, although the words are joint yet the cause of the grant shall be respected, and the rent shall be of the quality of the land, and, therefore, they shall have the rent in degree and quality of coparcenary and not jointly. And KNYVET, C.J., and Chancellor, said in 38 Edw. 3, 26, that if two coparceners make a feoffment in fee, rendering rent to them and their heirs, the heirs of both shall inherit, because their right in the land was several : 22 Edw. 4, 25 B. and 2 Rich. 3, 18 B. A joint submission to arbitration taken severally in respect of the several causes, etc. B

6. Sometimes ne res destruatur, et ut evitetur absurdum, as in 6 Hen. 7, 7 B. in cessavit, where the tenure is alleged by homage, fealty, and rent, and the demandant counts, that in faciendo servitia præd' cessavit, shall be by construction taken to such services only of which a man may cease. *The Prior of Tikeford's Case* (Y.B. 17 Edw. 3, fo. 1, pl. 5) in a scire facias against the successor of the prior on a judgment given in a writ of annuity for the arrearages in the time of the predecessor and of the successor, and the writ was that the predecessor and successor nondum reddiderunt, to which exception was taken that the predecessor was supposed not to render that which the successor ought, et non allocatur, for reddendo singula singulis, by reasonable construction the words may well stand together : vide 21 Edw. 3, 48 A. in a per quæ servitia, FITZHERBERT'S NATURA BREVIUM 14, in Monstraverunt. The reason of all these cases is either quod res non destruatur, or that the grant shall be taken more strong against the grantor, and shall take effect as near as may be according to the intent of the parties. C D E

This construction concurs with two of the said reasons in the case. (i) It shall be taken more strongly against the lessor. (ii) This construction will concur with the intent and meaning of the parties, for after the habendum and the number of the years these words are added : "existen' verum numerum annor' in dict' sursum reddit' indent' mentionat' "; in which indenture the habendum was several so that the intent of the parties was to have several beginnings in this new lease, etc., and the lessor and lessee never imagined but that the leases should begin severally, and not that the lessee should wait for Sexten's Meadow until the lease of Cheese Meadow, which is another distinct lease, and a distinct thing, should end. F

So it was adjudged, and the plaintiff had execution. Upon which judgment a writ of error was brought, and after many arguments it was resolved by SIR CHRISTOPHER WRAY, C.J., SIR THOMAS GAWDY, and the whole Court of King's Bench, that the lease to Hoe should have several beginnings. And so this case was resolved by both courts. G

In the same term in a case between Pollard and Alcocke in the Court of Wards, WRAY, C.J., clearly held that, if a man be seised of three acres of land in fee and makes a lease of one acre to A. for life, of another acre to B. for life, and of the other to C. in tail, and afterwards by deed (reciting the said estates) covenants with his brother that after all the said estates ended and determined he and his heirs would stand seised of the said three acres to the use of his brother in tail, etc., immediately on the death of B. the brother should have the acre leased to B. and should not tarry till all the estates, the other estate for life and the estate-tail, be ended, but reddendo singula singulis, by the covenant the estate in the several acres should vest at once in the brother and should take effect in possession as the several estates in possession end or determine. This was granted by the whole court. And in this case of Pollard, WRAY, C.J., cited and relied on the foregoing case of Francis Windham. H I

INWOOD *v.* TWYNE

[Lord Chancellor's Court (Lord Henley, L.C.), June 22, 23, 25, July 9, 1762]
[Reported 2 Eden, 148; Amb. 417; 28 E.R. 853]

Equity—Conversion—Infant's property—Purchase of real property—Considered as real estate.

Per Curiam: There is no general rule in equity that no person or means can convert an infant's personal estate into real estate or vice versa so as to bind the infant.

Part of an infant's real estate was settled in jointure upon her mother. The mother being financially distressed and about to sell her interest, a petition was presented, and the infant, upon a reference to the Master, and under an order of the court, purchased it. The infant afterwards attained twenty-one. She received the rents and profits of the estate and died aged nearly 23.

Held: the purchase, though made during her infancy, was to be considered as real estate.

Notes. Referred to: *Re Wells, Boyer* v. *Maclean*, [1903] 1 Ch. 848.

As to the conversion of an infant's property, see 14 Halsbury's Laws (3rd Edn.) 580. For cases see 20 Digest (Repl.) 418.

Cases referred to:

(1) *Thomas* v. *Kemeys* (1696), 2 Vern. 348; Freem. Ch. 207; 23 E.R. 821, L.C.; affirmed (1701), Colles, H.L.; 20 Digest (Repl.) 493, *2021*.

(2) *Gwillim* v. *Holland* (1741), cited in 18 Ves. at p. 393; 34 E.R. 366, L.C.; 35 Digest (Repl.) 704, *3753*.

(3) *Heir* v. *Administrator* (1690), Freem. Ch. 114; 22 E.R. 1094; sub nom. *Awdley* v. *Awdley*, 2 Vern. 192; 20 Digest (Repl.) 381, *1033*.

(4) *Mason* v. *Mason* (1724), cited in Amb. 371; 27 E.R. 247; 20 Digest (Repl.) 383, *1051*.

(5) *Earl of Winchelsey* v. *Norcloffe* (1686), 2 Rep. Ch. 367; Freem. Ch. 95; 1 Vern. 435; 21 E.R. 689; 20 Digest (Repl.) 381, *1032*.

(6) *Witter* v. *Witter* (1730), 3 P.Wms. 99; 24 E.R. 985, L.C.; 28 Digest (Repl.) 545, *597*.

Bill for an account of rents and profits of a jointured estate.

Colonel Inwood, upon his marriage with the plaintiff, entered into articles dated June 3, 1732, to settle his estate on himself for life, remainder as to certain premises, part thereof to Mrs. Inwood for life for her jointure, with remainder as to all the premises to his first and other sons in tail male, with remainder to his own right heirs for ever. Colonel Inwood died in 1746 without having carried the articles into execution, leaving the plaintiff his widow and an only daughter, Caroline Anna Maria, an infant.

On his death the plaintiff entered upon the jointure lands, and afterwards, being in distress, by indenture of lease and release bearing date April 15 and 16, 1755, between the plaintiff, of the first part, Thomas Bigs and three of her creditors, of the second part, and three other creditors, of the third part, conveyed her jointure lands to them, their heirs and assigns, during her life upon trust to sell. The creditors being about to sell, a petition was presented by the infant and her uncle at the Rolls setting forth, among other things, the assignment of the plaintiff and advertisement of sale; that such sale would be of great prejudice to her; that her nearest relations apprehended that it would be for her advantage to purchase; and that the mother, her next of kin, desired it. On a reference to the Master it was reported that it was in her interest to purchase the estate as she had the reversion and the mother, the next of kin, desired it for the sum of £1,100. On April 13, 1756, the trustees, in consideration of £1,100, conveyed and released the premises to James Bridges, his heirs and assigns during the life of Annabella Inwood. On July 7, 1756, James Bridges, for himself, his heirs and assigns,

declared the purchase-money to have been the proper money of the infant, and declared the trust to be for her benefit generally without adding any words of limitation. A

The daughter came of age on Mar. 28, 1760, and afterwards gave a letter of attorney to one Collett to receive the rents and profits of the estate. She died on Mar. 22, 1762, unmarried. The bill was filed by the plaintiff, as administratrix to her daughter, for an account of the rents and profits of the jointured estate. B

Wilbraham and *Comyn* for the plaintiff: The question is whether this interest belongs to the plaintiff as personal estate, or to the heirs by being merged in the inheritance. In the present case there is no merger at law, and there never is a merger in equity where there is none at law: *Thomas* v. *Kemeys* (1); so in *Gwillim* v. *Holland* (2), coram LORD HARDWICKE, L.C. 1741. The money with which this interest was purchased being the infant's, the interest continued personal estate till she came of age, and as she did nothing afterwards to alter the nature of it (for receiving rents alone did not make it real) it continued so till her death. There is no rule more certain than that guardians or trustees cannot alter the nature of an infant's estate: *Awdley* v. *Awdley* (3); *Mason* v. *Mason* (4). As to her acts after she came of age, they only consisted in her receiving money which might have been either of real or personal estate. C D

Sewell and *Perrot* for the defendants, the heirs of Caroline Anna Maria Inwood: It is nowhere laid down in such universal terms as that there is no case in which guardians or trustees can alter the nature of an infant's estate, particularly where it is so much for the advantage of the infant, as it is in the present case. That the court has power to do it may be collected from *Earl of Winchelsey* v. *Norcloffe* (5). In this case the infant applied, on the event of the mother's assignment, to have it converted; and on such application an order of this court was founded. It is admitted in this case that on the infant coming of age she received the rents and profits, and executed a power of attorney, which was a confirmation of the purchase of the real estate. E

June 9, 1762. *Wilbraham* in addition to his former arguments, relied on the constant practice of the court in similar cases not to alter the nature of an infant's property, as where there is a charge by a term of years on an infant's estate and it is discharged out of his personal estate during his minority the court never permits the term to merge, but orders it to be assigned to a trustee for the infant, his executors, etc. So in the case of Lord Leigh, where, by savings or otherwise, the trustees were enabled to purchase several farms which lay contiguous, the purchases having been made with the approbation of the court, there was an express provision that, if he died under twenty-one, it should be deemed personal estate. So in a private Act of Parliament for purchasing during the minority of Lord Plymouth, it was to him and his executors, etc., till twenty-one, with a proviso that on his attaining twenty-one he might call on the trustees to convey to him and his heirs: *Witter* v. *Witter* (6). F G H

LORD HENLEY, L.C.—The question arising upon this bill is whether Mrs. Inwood, the plaintiff, as administratrix of the daughter, is entitled to the profits of these farms for the life of Mrs. Inwood as part of the personal assets of the daughter or the defendants, as her heirs.

The case in effect is no more than this. On June 3, 1732, Mr. Inwood entered into articles to settle his estate. So far as concerns the present question on himself for life, remainder to his wife for life, remainder to his first and other sons in tail male, with reversion to himself in fee. Mr. Inwood dies, leaving one daughter, and on April 16, 1755, Mrs. Inwood conveys by lease and release this estate of hers to Mr. Bigs and others and their heirs for the benefit of themselves and the rest of the creditors. The creditors propose a sale of this interest in order to turn it into money. Upon this it appears that, by order dated Mar. 26, 1756, a petition was preferred on behalf of the infant, with the consent of her mother, her I

A only next of kin signing the petition, suggesting that it would be for the infant's benefit to purchase and have the purchase money paid out of the personal estate, and praying a reference to the Master to inquire into the fitness of the proposal, and to have the money paid by the Accountant-General out of her stock amounting to £9,000 or £10,000. The Master approves the purchase, appoints a receiver of the real estate pursuant to the decree, and takes an additional security in con-
B sequence of the augmentation of it by this purchase. On Mar. 31, 1756, Mr. Bigs and the other grantees convey to Mr. Bridges and his heirs the very estate granted to them. On July 7, 1756, Mr. Bridges declares that the purchase-money was the money of the infant and declares the trust of his conveyance for her. The infant lived to attain twenty-one, entered on the estate of which she was actually seised in fee, received the rents, and appointed her steward to receive and recover them.
C Notwithstanding this it is said that this must be considered of the nature it originally was, and in lieu of which it came, the £1,100 personal. Besides, it is said to be a general rule in equity that no person or means can convert an infant's personal estate into real or vice versa so as to bind the infant. This is a point of very great consequence, and, if there is any such general rule it ought to be adhered to, but the rule is quite otherwise, and reason as well as practice are in
D direct opposition to it. Indeed, it is absolutely necessary that it should be so.

To consider this position step by step, and first with regard to trustees or guardians of their fortunes. I do not know any such general rule. I can conceive many cases where a conversion of such estate might be made by trustees or guardians and this court would support and approve their conduct, and it would be strange to say that trustees would be censured in this court for doing what the
E court would have ordered to have been done. I am very sure that it is a power which this court has exercised, and which I have in substance executed, without any provision to retain the former quality or without any dispute upon it. Indeed, it seems to be admitted that in both cases, if for the benefit of the infant, it may be done.

If this court cannot dispose of the infant's personal estate and convert, there
F would be an end of the question. But I am of opinion that the court, which stands in loco parentis, may dispose of such money for the benefit of the infant so as to make it real even during the infancy. If the court can do this, it appears to me in the present case that the court and all the parties intended to do so, and it was for their benefit that it should have been so done. The court knew that the infant had the fee of the whole estate, and that nothing stood out against her, but
G the wife's equitable estate for life. The consequence of this was that nothing but an equity could be conveyed to the infant's trustee, and the conveyance of a partial equity to a person possessed of a pure legal fee can operate only by way of extinguishment. It seems clear to me that the moment Mr. Bridges declared the trust for the infant, his estate vanished and he had no longer any interest in
H him nor she any remedy in this court against him.

The case of the *Earl of Winchelsey* v. *Norcloffe* (5), as to the power, authority and practice of the court, is in point, for there the Lord Chancellor agreed with the Master of the Rolls that, if the trustees had obtained a decree for investing this money in a purchase, the court would have maintained the decree, but adhered to that which I take to be the general rule, that trustees could not at will
I and pleasure convert personal to real, and very properly considered that as no purchase for the infant, it only being to be so on his election. In that case there was no question on the validity of the purchase but between executor and heir, so that what the court did on that subject is merely applicable as to its being real or personal during the minority. If I were to decree for the plaintiff in this case, I should act contrary to her own petition, and contrary to the direction of the judge who made the order on that petition.

I have said all this on the supposition that the daughter had died under twenty-one, but, in truth, she lived to attain that age, acted as owner, received rents, etc.,

and executed a letter of attorney appointing a receiver. If this be not a confirmation, I know not what is. Where is the line to be drawn? Must she live three days, three months, or three years after twenty-one? In the present case, therefore, if there could have been any doubt on the other point, the bill must be dismissed on this.

Bill dismissed.

SCRIMSHIRE (OTHERWISE JONES) *v.* SCRIMSHIRE

[Consistory Court of London (Sir Edward Simpson), July 29, 1752]

[Reported 2 Hag. Con. 395; 161 E.R. 782]

Conflict of Laws—Marriage—Validity—Solemnisation abroad—Determination by law of foreign country.

By English law the validity of a marriage solemnised abroad is to be determined by the law of the country wherein it took place and not by the law of the country where the parties are domiciled. For this purpose the English court will take notice of the law of the foreign country. By entering into a marriage in a foreign country the parties subject themselves to the law of that country relating to marriage.

Notes. Followed: *Middleton* v. *Janverin* (1802), 2 Hag. Con. 437. Considered: *R.* v. *Millis* (1844), 10 Cl. & Fin. 534; *Connelly* v. *Connelly* (1850), 2 Rob. Eccl. 201; *Ogden* v. *Ogden*, [1904–7] All E.R.Rep. 86. Followed: *Mitford* v. *Mitford and Von Kuhlmann*, [1923] All E.R.Rep. 214. Considered: *Salvesen* (*or Von Lorang*) v. *Austrian Property Administrator*, [1927] All E.R.Rep. 78; *Berthiaume* v. *Dastous*, [1929] All E.R.Rep. 111; *Inverclyde* v. *Inverclyde*, [1931] P. 29; *Corbett* v. *Corbett*, [1957] 1 All E.R. 621; *Taczanowska* (*orse Roth*) v. *Taczanowki* (*Krystek cited*), [1957] 2 All E.R. 563; *Merker* v. *Merker*, [1962] 3 All E.R. 928. Referred to: *Harford* v. *Morris* (1776), 2 Hag. Con. 423; *Ruding* v. *Smith* (*Falsely called Ruding*), [1814–23] All E.R.Rep. 472; *Simonin* v. *Mallac*, [1843–60] All E.R.Rep. 68; *Brook* v. *Brook* (1861), 9 H.L.Cas. 193 (see [1861–73] All E.R.Rep. 493; *Hutter* v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368; *Kochanski* v. *Kochanskay* [1957] 3 All E.R. 142; *Ross Smith* v. *Ross Smith* (*orse Radford*), [1962] 1 All E.R. 334; *Lazarewicz* v. *Lazarewicz*, [1962] 2 All E.R. 5.

As to the validity of foreign marriages, see 7 Halsbury's Laws (3rd Edn.) 88 et seq. For cases see 11 Digest (Repl.) 455 et seq.

Cases referred to:

(1) *Arthur* v. *Arthur* (1720), cited 2 Hag. Con. 401, n.

(2) *R.* v. —— (1663), 1 Sid. 171; Kel. 79; 82 E.R. 1038; 15 Digest (Repl.) 887, *8553*.

(3) *Wey* v. *Yally* (1704), 6 Mod. Rep. 194; Holt, K.B. 705; 2 Salk. 651; 87 E.R. 948; 31 Digest (Repl.) 290, *4251*.

Suit for restitution of conjugal rights.

The validity of the marriage was denied, as being a foreign marriage not celebrated according to the laws of the country in which it was contracted. The question appears to have been then brought for the first time to judicial determination in the ecclesiastical court, and the effect of the decision was the subject of much discussion in subsequent cases.

SIR EDWARD SIMPSON.—This is a case primae impressionis and of great importance not only to the parties but to the public in general. The suit is brought by Miss Sarah Jones for restitution of conjugal rights. She pleads a

marriage in France, clandestine and forbidden by the laws of both countries, with this difference, that by the laws of France such marriages are, in all cases, absolutely null, whereas by the laws of England, they are only irregular, but not null, unless under special circumstances that warrant the court to put that construction upon them. An allegation has been given in on the part of Mr. Scrimshire which pleads that he was drawn in by surprise and terror to marry; that the marriage was celebrated in France; that by the laws of France the marriage of minors under twenty-five, unless with the consent of parents, is null and void; and that marriage can only be legally celebrated in that country by the proper priest, licensed to marry and exercise his functions within the jurisdiction where the parties live. Mr. Scrimshire says that he was a minor, about eighteen, and that Miss Jones was about fifteen, that the marriage was solemnised in a private house by a priest not authorised and without the consent of parents, and that under these circumstances the marriage was null by the laws of France. A sentence of the Parliament of Paris declaring the marriage null is also pleaded, not as a bar to entering into the question in this court whether the marriage be good or not, but as evidence of the law of France which may be material for the consideration of this court in determining, whether this be a good marriage by the law of England or not.

[Preliminary objections were dealt with which do not now call for report.]

The general questions are two: (i) whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate marriage in such a manner as the laws of this country would deem to constitute marriage if there was nothing else in the case, but a question on the fact of the marriage; (ii) whether, if the fact of the marriage should be proved, this marriage can, by the laws of this country, be effectuated and pronounced to be good, being solemnised in France where by law it is null and void to all intents and purposes. It seemed to be admitted in the argument that the law was so, but it was argued that it ought not to be a rule of determination in this cause.

As to the fact of marriage, it is to be observed that it is a marriage between minors, that it is a clandestine marriage in a private house, not by the regular priest, that it is unfavourable and discountenanced by the laws of both countries, and if there had not been a special act of grace, none of the persons present at the marriage could have been legal witnesses to prove it, since it is the constant practice in ecclesiastical courts, to repel the testimony of persons present at clandestine marriages till they have been absolved. Persons present at such marriages are excommunicate ipso facto, and in our courts it is not thought necessary to have a declaratory sentence of an excommunication ipso facto for the court can ex officio take notice of it. The practice on this point has been confirmed by constant use under the received maxim that lex currit cum praxi, and it has been so determined lately by DR. ANDREW in the case of Collis.

It is to be observed that this marriage was performed by a Romish priest, according to the Roman ritual. The Romish Church acknowledges several orders, though bishops, priests, and deacons corresponding to those orders in the church at Rome are only allowed by us. In the form of making and consecrating bishops: see statute (1549) 3 & 4 Edw. 6, c. 12; the Act of Uniformity, 1551, s. 5; and the Act of Uniformity, 1662 (7 HALSBURY'S STATUTES (2nd Edn.), p. 574, p. 583 respectively); it is declared that no man

> "is to be accounted or taken to be a lawful bishop, priest, or deacon, or suffered to execute any function, except he be admitted thereto, according to the form following, or hath had formerly episcopal ordination and consecration."

Bishop Gibson observes that this last clause was designed to allow Romish converted priests who had been before ordained by a bishop to be received without re-ordination, namely, that they might be received to exercise the functions of a priest and do the duties of the English clergy, but not to allow them to celebrate marriage according to the Roman ritual, for by the law of this country, it is, I apprehend, prohibited under severe penalties for a Roman Catholic priest to be

in this country and to exercise any part of his office as a Popish Priest in this kingdom. [As to the present legal position of Roman Catholics under English Law see 13 HALSBURY'S LAWS (3rd Edn.) 519–524.] But as a priest popishly ordained is allowed to be a legal presbyter, it is generally said that a marriage by a popish priest is good, and it is true where it is celebrated after the English ritual, for he is allowed to be a priest. But upon what foundation a marriage after the popish ritual can be deemed a legal marriage is hard to say. Indeed, the canon law received here calls an absolute contract ipsum matrimonium, and will enforce solemnisation according to English rites, but that contract or ipsum matrimonium does not convey a legal right to restitution of conjugal rights, though an English priest had intervened, if it were otherwise than according to the English ritual. Upon what reason or foundation, then, should a contract of marriage entered into by the intervention of a popish priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract, that is considered, by the canon law, as ipsum matrimonium?

There may be other instances, but I have not met with any but that of *Arthur* v. *Arthur* (1), where a marriage by a Popish priest by the Roman ritual has been pronounced for, but that was a marriage in Ireland, between parties both Catholics, where the laws with respect to Papists are different, which laws, as the laws of the country in which the contract was made, the court would respect. And in that case there was consummation that purified any condition in the contract. There can be no doubt, but that a marriage here by him who is in allowed orders, according to the English ritual, would be good by our laws. But I much doubt whether a marriage in England by a Romish priest after the Romish ritual, would be deemed a perfect marriage in this country, the Act of Parliament having prescribed the form of marriage in this country and changed that condition in the contracting part, in the Roman ritual, "if Holy Church permit," to "according to God's Holy Ordinances," and Acts of Parliament having prohibited to Roman Catholic priests the exercise of their functions. And I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as thirds, dower, etc. How can a bishop try or certify such a marriage? Can he certify that English subjects residing in England were lawfully married according to the laws of England if they were not married according to the rites prescribed by Act of Parliament for marriages in this country? Would a contract only by the intervention of a Romish priest, or any priest, be deemed a legal marriage? The Roman ritual not being the same with ours, such a ceremony is nothing more than a contract.

What I have said relates only to marriages in England by Popish priests. For there can be no doubt but a marriage properly celebrated abroad by a Popish priest, after the Roman ritual would be deemed here a good marriage, for I apprehend that by the law of England, marriages are to be deemed good or bad according to the laws of the place where they are made. It has been determined at common law that, if a man marries two wives, the first in France and another here, he may be tried and indicted here for that as felony: *R.* v. —— (2). Therefore, a marriage in France is deemed a good marriage though not agreeable to our law, for in matrimonial causes all laws take notice of the law of other countries.

As to the proofs relating to the asserted marriage, in the present case, it is not necessary to state them particularly. It is in proof from the witnesses and the answers of Miss Jones that the parties became acquainted in June, 1741; that Mr. Scrimshire went two or three times afterwards to France and visited her; and that he was intimately acquainted with her, had great attachment to her, and expressed a great desire to marry her. He proposes marriage, buys a ring, applies to persons to get a priest to marry them, and declares his intention to marry. Three witnesses speak to the fact of the marriage, and all of them swear that it was free and voluntary. He goes home and returns to be married, which shows that it was done voluntarily. The paper, which is all of his own handwriting

and which is proved by Keating, the only surviving witness, to be free and voluntary, owns her to be his wife. He claims her two or three days after the marriage, owns her to be his wife, but desires that it might be kept secret. He made a declaration to Mr. Asgel in 1744, that, if it was to do over again, he would marry her. In June, 1749, there is a recognition, when he seriously owned her to be his wife to her brother and Major Blagney. There were also many declarations on her side, and there is not a tittle of proof of any force or terror having been practised upon him though it was pleaded.

The witnesses to the marriage, indeed, are not of the fairest character. The general character of the priest is bad. There has been a sentence against Macgrah, condemning him to the galleys. They were all present at a clandestine marriage which in some measure affects their credit and would have gone to their competency had it not been for the act of grace. They differ in some circumstances. The priest says "that it was after the Roman ritual. Macgrah and Keating and Jones say: "that it was after the English ritual." The form is pretty much the same; they might mistake. But I am inclined to think that it was after the Roman ritual. Macgrah says "The priest set out for Bologne before Macgrah, and he did not see him again till he came into the room." The priest says: "They set out together and arrived in the evening"—that Macgrah left him and returned in three hours to the inn, and carried him to Mrs. Dunbar's house. Macgrah says: "Bagot gave the priest five guineas." The priest says Macgrah did this. Macgrah says: "Cummins asked the parties if they continued in the resolution to marry." Keating says that Bagot asked that question. Cummins says Macgrah asked it, and there are some other differences. Yet, on the whole evidence taken together, there seems to be full proof of affection, courtship, recognition, and a fact of marriage, by the intervention of a priest, without which undoubtedly by our law it could only be a contract. The priest swears that he was ordained a priest, and was so, "and was reputed as such." Though his orders are not produced, yet I apprehend that this evidence is sufficient to make legal proof of it, in which I am warranted by the determination in *Arthur* v. *Arthur* (1), where a marriage by a Popish priest was pronounced for, it having been sworn "that he was ordained and reputed so."

By the particular municipal laws of this country a clandestine marriage by a Popish priest after the English ritual, is not void, though irregular, though the priest and the parties marrying, and present at it, may be liable to punishment for a breach of the law. But I am not satisfied, as I have before intimated, that a marriage in this country by a Popish priest after the Roman ritual could be deemed a good and legal marriage, especially where there has been no consummation. But as this marriage was had abroad where the Roman ritual is in use, I should have had no doubt in pronouncing for it, had there been evidence that it was a marriage agreeable to the laws of that country.

The great difficulty arises on the second question from the marriage being celebrated in France, where, as it appears from Young's evidence and the sentence of the Parliament of Paris, such marriage is null by the laws of France. It has been much insisted on, however, that the laws of France are of no consideration in this case, the parties being both English subjects, and not domiciled in France, which alone, as is contended, could subject them to the French laws.

The general principles which have been referred to on the subject of domicil are that a minor son is domiciled where his father lived until the son comes of age or settles in another kingdom; that domicil by birth is presumed to continue till the contrary is proved; that he only is said to have changed his domicil "quando quis re et facto animum manendi declarat," and that "domicilium non procedit, si ille haberet animum revertendi," and, therefore: "Qui studiorum causa aliquo loco morantur, non domicilium ibi habere creduntur"—that minors who may be with a mother or guardian in another country, or may be carried there by a mother's orders, cannot be said to have an intention to change their domicil or to have a mind to be domiciled there and "requiritur necessario animus ut domicilium acquiratur, et domicilium ex animo contrahitur, et pendet ex animo."

With respect to Miss Jones, it is contended that she is by birth English and that her father is now living; that she has no estate in France and is to be considered as domiciled in the country where her father lives; that there is no proof showing any intention on her part to change her domicil; that she only went to France to visit a relation by order of her father and for education, and had been there about eighteen months; and being a minor, could have no animus manendi longer than her father would permit, particularly at the house of her aunt Mrs. Dunbar where she was only a lodger; and that she must be considered, on principles of legal construction, as being there for temporary purposes only and with the animus revertendi.

With respect to Mr. Scrimshire, it is said that he was also a minor by birth domiciled in England where his father died; that he had no estate in France and is to be presumed to be domiciled in England, the contrary not being proved; that he had gone to France on several occasions to visit his mother who had been living in France for about two years and a half, and the last time he went, about fourteen days before this marriage, in order to proceed to Angiers for education; that the animus revertendi was to be presumed as to him as much as any traveller, and there was no act done by him or declaration which showed that he had an intention to stay there or anything from which such an intention can be inferred. The mother, as guardian, could not, by obliging him to live with her, effect a change of his domicil, since there could be no animus manendi if it was done by order and constraint and "ex animo domicilium contrahitur."

On these representations it is insisted that, both parties being subjects of England, born here and sent over to France for education, and not having any estate, on which the marriage in France could operate there, a residence such as there appeared to be could not give a foreign court any jurisdiction, for, if it did, the consequence would be that the right of English subjects must be tried by foreign law and the estates of English subjects, lying in England, must be governed by French law, which is not to be endured. This was, in general, the purport of the argument for Miss Jones. But I apprehend the case in judgment before me does not turn or depend on the mere question of domicil. The question before me is not whether English subjects are to be bound by the law of France, for undoubtedly no law or statute in France can bind subjects of England, who are not under its authority, nor is the consequence of pronouncing for or against the marriage with respect to civil rights in England to be considered in determining this case. The only question before me is whether this be a good or bad marriage by the laws of England. I am inclined to think that it is not good.

On this point I apprehend that it is the law of this country to take notice of the laws of France or any foreign country in determining upon marriages of this kind, the question being in substance whether, by the law of this country, marriage contracts are not deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed by that law. If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country which sanction and adopt this rule of decision. By the general law, all parties contracting gain a forum in the place where the contract is entered into. All our books lay this down for law. It is needless at present to mention more than one. Gayll, lib. 2, obs. 123 says:

> "In contractibus locus contractus considerandus sit. Quoties enim statutum principaliter habilitat, vel inhabilitat contractum, quoad solemnitates, semper attenditur locus, in quo talis contractus celebratur, et obligat etiam non subditum."

And again, lib. 2, obs. 36:

> "Quis forum in loco contractus sortitur, si ibi loci, ubi contraxit, reperiatur; non tamen ratione contractus, aut ratione rei, quis subditus dicitur illius loci, ubi contraxit, aut res sita est; quia aliud est forum sortiri, et aliud subditum

esse. Constat unumquemque subjici jurisdictioni judicis, in eo loco in quo contraxit."

This is according to the text law, and the opinion of Donellus and other commentators. There can be no doubt, then, but that both the parties in this cause, though they were English subjects, obtained a forum, by virtue of the contract, in France. By entering into the marriage contract there, they subjected themselves to have the validity of it determined by the laws of that country. So long as they resided there, each party might sue the other and bring the case before that jurisdiction, to be determined by the law of France. This cause seems to have been begun very properly in France against Miss Jones while she was resident in France and subject to that forum, in order to have it tried by its proper forum. For it appears that Mrs. Scrimshire, the mother of the minor, protested of the nullity of the marriage by a protest in which she gives a large account of the transaction, on Mar. 3, 1744, and this protest was personally notified to Miss Jones in France.

It appears further, that Mrs. Scrimshire having had notice that some affidavits and a certificate of marriage were enrolled in an office in France, on Mar. 13, 1744, petitioned the Seneschal, setting forth the protest and clandestine marriage and the enrolment of the affidavits, acts, and certificate, and prayed to have the acts, etc., communicated to her in order that she might draw such conclusions from them as might be lawful in the proceedings to be had in regard to her son, and that the acts might be brought to be inspected by the judge for that purpose; and she declared her intention to prosecute the parties for the raptus seductionis as it is termed in the laws of France. On Mar. 14 this was likewise notified personally to Miss Jones, and in her answer she admits that she had such notice.

A proctor appears there for Miss Jones and alleges that she was a minor and not properly cited, being a foreigner. His objection was overruled, and I must suppose lawfully. The Seneschal orders the acts, etc., to be delivered to Bagot, he giving security to produce them on an appeal. From this sentence, Mrs. Scrimshire appeals to the official of Bologne, and sets forth the decree and that she is materially interested to cause the marriage to be annulled, and she prays that the acts may be brought into court which are necessary to prove the marriage fraudulent, for the purpose of annulling it, and protests of presenting a petition to him for that purpose. The Official inhibits the Seneschal from delivering out the papers, but, the Official having only authority over the Seneschal and to try the validity of the marriage, and not having criminal jurisdiction, it was thought proper to drop that proceeding by the advice of counsel, and to proceed before the Parliament of Paris, where effectual justice could be done, by securing the papers, and punishing the parties guilty of the raptus seductionis, and the marriage might also be annulled. On April 18, 1744, an appeal was accordingly interposed "from the sentence of the Seneschal at Bologne, and from the celebration of marriage."

All this appears from the proceedings, and I am to presume that it was agreeable to the laws of France. The criminal proceedings for the raptus seductionis lasted from April 18, 1744 to Feb. 27, 1749, on which last day the French subjects who had been privy to this transaction were condemned to the galleys, and Miss Jones and others were banished for five years. On Aug. 26, 1749, the marriage was annulled.

It has been much insisted in argument that a citation was taken out here in June, before the sentence at Paris, and that an absolute appearance was given by Mr. Bogg [counsel for Mr. Scrimshire] then. But it is to be observed that issue was not joined till Oct. 26, 1749, after the sentence, and that the appeal to the Parliament of Paris was in April, 1744. I do not apprehend that the mere appearance given here by Mr. Bogg before the sentence in France, is, in point of law, a waiver of proceedings in France or of the law of France, or an electing of another court.

The suit here is for restitution of conjugal rights, and a sentence in France is

not of itself a bar to such suit. It is only evidence of what the French law is by which the court is to try the validity of the marriage or contract. If there had been no sentence in France, the party might have shown that it was not a good marriage by the laws of France, and he might equally have denied the marriage whether there had been proceedings and sentence or not at Paris, as I take it to be clear that both parties in the cause had obtained a forum in France where the marriage contract was entered into, and by marrying there had subjected themselves to be punished by the laws of the country for a clandestine marriage, and had also subjected the validity of the contract to be tried by the laws of that country, as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage or not according to the laws of that country, which is still more strongly shown in this case, by inserting the words: "If Holy Church shall it admit."

I must observe also that the suit was commenced against Miss Jones concerning the marriage in France before she left that country, for, from the beginning, the proceedings by Mrs. Scrimshire were in order to annul the marriage, and, though Miss Jones left France before the direct question on the marriage was brought before the court in France, yet she was there during the time when Mrs. Scrimshire was taking proper steps to annul the marriage, and, on that account, I must consider the cause as begun against her before she left France, and when, undoubtedly, by her residence and marriage she was subject to the jurisdiction of that country. She ought, therefore, to have stayed in France to have defended her rights there. She might have done so, notwithstanding the war. There have been instances of persons doing so in this country.

As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage, and as their mutual intention must be presumed to be that it should be a marriage or not according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage, or contract, "ad aliud examen," to be tried by different laws from those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books and what is practised in all civilised countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such.

This subject is much discussed by Sanchez (De Matrim., lib. 3, de clandestino consensu, disput. 18, § 10), to the following effect, that as to the maxim or general rule.

> "Ut non teneantur peregrini legibus et consuetudinibus loci per quem transeunt, [this rule has exceptions] 1st, Quoad contractuum solemnitatem; nam quicunque forenses, et peregrini tenentur servare solemnitates in contractu requisitas legibus et consuetudinibus oppidi in quo contrahunt; ratione enim contractus quilibet forum sortitur in loco contractus; hinc est contractum absolute initum, censeri celebratum, juxta consuetudines et statuta loci in quo initur. Quod ita provenit, quia contractus sequitur consuetudines et statuta loci in quo celebratur."

And a case is put as to inhabitants of a place where the decree of the Council of Trent for avoiding clandestine marriages is not received. Suppose from England they go to places "per modum transitus, ubi obligat decretum," and marry there according to the laws of their own domicil. Some think that such marriage is good in the case of strangers as agreeable to their own laws, to the law of the country in which they are domiciled, though not to the law of the place where they are married. But Sanchez thinks the marriage void, because it wants the solemnities

> "quæ petunt leges loci ubi contractus initur; et quoad solemnitatem adhibendam in contractibus, solæ leges loci in quo contractus celebratur inspiciuntur."

These authorities fully show, that all contracts are to be considered according to the laws of the country where they are made. The practice of civilised countries has been conformable to this doctrine, and by the common consent of nations has been so received.

The cases mentioned in the French advocate's opinion, as well as that quoted by DR. PINFOLD from the JOURNAL DES AUDIENCES, lib. 1, c. 24, establish this principle. It is likewise said that, if the inhabitants of a country where clandestine marriages are forbidden, go to a country where they are allowed and marry there in transitu, the marriage is good:

> "peregrinos a domicilio absentes non teneri legibus illius, si contrariæ vigeant in loco ubi reperiantur."

According to this authority also it is plain that the laws of the country where a marriage is celebrated are to be the rule by which the validity of it is to be tried.

VOET (Dig., lib. 23, tit. 2, n. 85, fol. 55) also puts the point in the same manner:

> "Qua solemnitate, quibus modis, contractus quisque celebrandus sit, quando solemniter initus ac perfectus intelligatur, ex lege loci in quo contractus celebratur dijudicandum est; non vero ex statutis regionis illius, ubi sitæ sunt res immobiles, circa quas, primario, aut per consequentiam, contractus versatur."

MYNSINGER (Singul. Observat. cent. 5, obs. 20, n. ult.) also may be cited to the same effect. And a case is stated of a Frenchman of Paris and a minor going to Lorrain and marrying there according to law. The wife has a child, and then leaves Lorrain and goes to Paris and claims her husband. His friends institute a criminal prosecution to annul the marriage for want of consent of parents. One court thought this marriage the raptus seductionis, but on an appeal the Parliament reversed that determination.

So in Holland, VOET says (Dig., lib. 23, de ritu nuptiarum, tit. 2, n. 4, fol. 20) if an inhabitant of Holland contract a marriage in Flanders or Brabant with a woman of the country, observing those rites which by the laws of Flanders or Brabant are required, it would appear that such marriage would be deemed good in Holland.

> "Eo quod sufficit in contrahendo adhiberi solemnia loci illius, in quo contractus celebratur, etsi non inveniantur observata solemnia, quæ in loco domicilii contrahentium, aut rei sitæ, actui gerendo prescripta sunt."

The States of Holland have given two sentences in that manner. VOET's own opinion, however, is that the marriage was bad, not upon general principles of law, but on account of a particular and positive law in Holland which makes all marriages whatever of Dutchmen, wherever they be, void, unless the banns are published in Holland.

As to the practice of England, there is the case of Miss Fairfax, daughter to Lord Fairfax, who was publicly married to Lord Abergavenny at Paris, she being a minor, and not having her mother's consent. A suit was instituted before the Parliament of Paris to annul the marriage, and it was annulled. She came to England and was maid of honour to King James's Queen and was afterwards married to Sir Charles Carter, and Lord Abergavenny married Lord Bellasis' daughter. This shows that in marriages abroad by English subjects, the English law takes notice of the foreign law. For, if the French sentence in that case was not to be taken notice of here, they might both have been prosecuted for bigamy, and the children of the second marriage would have been bastards. SIR JOHN KELYNG [Kel. 79: *R.* v. —— (2)] also lays it down that, if a man marries in France and afterwards here, his first wife being living, he may be prosecuted for felony. For this reason—because the law takes notice of foreign marriage: So where a foreign issue which is local arises it may be tried here by a jury according to the laws of the foreign country, and upon nihil debet pleaded the laws of that country may be given in evidence: *Wey* v. *Yally* (3).

Why may not this court, then, take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books, the practice of nations, and the mischief and confusion that would arise to the subjects of every country from a contrary doctrine, I may infer that it is the consent of all nations—the jus gentium—that the solemnities of the different nations with respect to marriages should be observed and that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule where one party is domiciled and the other not? The jus gentium is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it, and this court observing that law in determining upon this case cannot be said to determine English rights by the laws of France, but by the law of England of which the jus gentium is part.

All nations allow marriage contracts. They are "juris gentium," and the subjects of all nations are equally concerned in them. From the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage that such marriages should be good or not according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries—that is, the law where the contract is made.

By observing this law, no inconvenience can arise, but infinite mischief will ensue if it is not. For instance, supposing this marriage should be declared good, might not Mr. Scrimshire nevertheless go into France and marry another woman there, the first marriage being null there. He might come into England after his marriage in France and live here and could not be prosecuted for bigamy according to KELYNG [*R.* v. —— (2)], for the felony, being done abroad could not be tried here. The consequence of this would be that he might have two wives and might have lawful issue by both in different places. Mr. Scrimshire's children in France would be bastards in England but would be legitimate in France and might inherit there; and the children by Jones would be legitimate in England but bastards in France and would not inherit there. The French woman whom he married in France would have no right to English effects, for Jones is the lawful wife here. Jones would have no right to French effects, for she is not the lawful wife in France. And if, as it may happen, after they have had children, both should go to France and should marry again, and have children in France—what infinite confusion would attend all these consequences of such a principle, to the great detriment and inconvenience of themselves and their issue, and the subjects of both countries?

Again, if countries do not take notice of the laws of each other with respect to marriages, what would be the consequences if two English persons should marry clandestinely in England, and that should not be deemed a marriage in France? Might not either of them, or both, go into France and marry again because by the French law such a marriage is not good? What would be the confusion in such a case? Or, again, suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage, undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in France and the marriage should be declared null because the man was not domiciled, he might take a second wife in France, and that wife would be entitled to legal rights there and the children would be bastards in one country and legitimate in the other. So that in cases of this kind, the matter of domicil makes no sort of difference in determining them because the inconvenience to society and the public in general is the same whether the parties contracting are domiciled or not. Neither does it make any difference whether the cause be that of contract or marriage, for, if both countries

A do not observe the same law, the inconveniences to society must be the same in both cases. As it is of consequence to the subjects of both countries and to all nations that there should be one rule of determining in all nations on contracts of this kind, it is to be presumed that all nations do consent to determine on these contracts by the laws of the country where they are made, as such a rule would prevent all the inconveniences that must necessarily arise from judging by differ-
B ent laws, and is attended by no manner of inconvenience, but is for the advantage of the subjects of all nations.

In the present case, there has been a sentence of the proper forum pronouncing on the whole facts of the case and the principles of the laws of France as applied to them. In matters that belong to the jus gentium, our courts always regard the sentences of a proper court. As to sentences in England by a proper court on a
C matter within its jurisdiction, without doubt they may be pleaded in bar to a suit here for the same matter. The probate of a will, or a sentence for or against a marriage in the ecclesiastical court will be received in bar where the same is attempted to be drawn into dispute at common law. But the law of this country goes further than the sentences of our own courts. If an Englishman makes a will abroad, appoints a foreigner executor, and has no effects in England, and the
D executor proves the will lawfully abroad, that probate or sentence of the proper court establishing the will as to effects there of a man domiciled there would be a bar to a discovery in Chancery of effects abroad.

In commercial affairs, under the law merchant, which is the law of nations, there are instances where sentences for or against contracts abroad have been given, and received here on trials, as evidence and have had their weight. This
E has been allowed on a principle of the law of nations which all countries by consent agree to for the sake of carrying on commerce which concerns the public in general. There are instances of the same kind in the Court of Admiralty. The sentences of all courts of admiralty are taken notice of by one another; they are obligatory by the law of nations. By the mutual consent of all nations they take notice of one another's sentences, and give mutual faith to their proceedings. All courts
F of admiralty in Europe are governed by the same law, the law of nations. It is just, by the law of nations, for nations to be aiding and assisting to each other. Therefore, as the law of England takes notice of the law of nations in commercial and maritime affairs, because all countries are interested in those questions, and as all countries are equally interested to have matrimonial questions determined by the laws of the country where they are had and the mischief would be infinite
G to the subjects of all nations if it was not so, I am of opinion that this is the jus gentium of which this and all courts are to take notice.

The principle and rule of law, as laid down in our books, is:

> "Quod justæ nuptiæ solum dicuntur, quæ rite et secundum præcepta legum contrahuntur. Quod non dicuntur conjuncti, qui contra leges juncti sunt. Quod contra jus non sunt nuptiæ."

H

LINDWOOD says (fol. 155, lib. 3, tit. 9, de locato et conducto v. non teneant et v. obligatur):

> "Verum est quod ubi lex vel statutum resistit obligationi, tunc nec initur civilis, nec naturdis obligatio. Ratio est quia obligatio naturalis dicitur de jure
I gentium. Sed de jure gentium debemus obedire majoribus, ille ergo qui contrahit contra præcepta legum, facit contra jus gentium, unde merito non obligatur etiam naturaliter."

So that it is certain that by the law of all countries a contract against law has no moral or natural obligation.

Therefore, under the circumstances of this case, as here is satisfactory evidence from the proceedings and sentence in France and from the evidence of witnesses that this marriage was celebrated in France contrary to the laws of France, and is null, and not obligatory, either civiliter or naturaliter, by the laws of France; as

there is no positive law of this country which prohibits the court from taking notice of the jus gentium; and as the law of the country where the contract is made seems to me, according to the law of nations, to be the only rule of determining in these cases, I cannot pronounce for the marriage, but must pronounce against it and dismiss Mr. Scrimshire from the suit. But under the particular circumstances of this case in which there is no doubt that a marriage was had freely and voluntarily, and as this affair has been prejudicial to Miss Jones, who is a lady of good character, I shall, agreeably to precedent, give a sum to her nomine expensarum, and fix it at £400. The lady may be happy, I hope, in a man that deserves her better.

Suit dismissed.

SAVAGE *v.* FOSTER

[Court of Chancery, Trinity Term, 1723]

[Reported 9 Mod. Rep. 35; 88 E.R. 299]

Estoppel—Estoppel by conduct—Acquiescence—Sale of land—Title—No notice of his title given by third person to purchaser—Third person estopped from setting up title against innocent purchaser.

A person who, knowing his own title to property, stands by while another purchases that property in the belief that he acquires a good title to it cannot afterwards set up his title against the innocent purchaser, for it is an apparent fraud in him not to give notice of his title to the intended purchaser. In such case infancy or coverture shall be no excuse.

Notes. Referred to: *McAlister* v. *Bishop of Rochester and Ecclesiastical Comrs. for England* (1879), 42 L.T. 22; *Bell* v. *Marsh*, [1903] 1 Ch. 528.

As to acquiescence operating as an estoppel, see 14 Halsbury's Laws (3rd Edn.) 640; and for cases see 21 Digest (Repl.) 459.

Cases referred to:

(1) *Watts* v. *Creswell* (1714), 2 Eq. Cas. Abr. 515; 9 Vin. Abr. 415; 22 E.R. 435, L.C.; 28 Digest (Repl.) 525, *416.*

(2) *Clere* v. *Earl of Bedford* (prior to 1690), cited in 9 Mod. Rep. at p. 38; 88 E.R. 300; sub nom. *Clare* v. *Earl of Bedford*, 2 Vern. at p. 151; 13 Vin. Abr. 536; 28 Digest (Repl.) 526, *417.*

Bill by the plaintiff to have his title to an estate established.

Margaret Smith, being seised of the lands in question, on her marriage with Peter Flavill settled the same on trustees and their heirs to the use of Peter Flavill for life, then on Margaret, his intended wife, for life, remainder, after the death of Peter and Margaret, to the heirs of Peter on the body of Margaret to be begotten, remainder to the right heirs of Margaret for ever. Peter and Margaret had issue only one daughter, the defendant, who was married to one Foster.

Peter Flavill died and his widow Margaret married one Brown, by whom she had issue one other daughter and no more. This second daughter was courted by one Williams, but he refused to marry her without such a fortune as Margaret was not able to give without breaking through this settlement. The defendant, Mrs. Foster, and her husband who knew that the lands were settled on her in tail, solicited Margaret to make a conveyance in favour of Williams, and assisted in carrying on the marriage between him and her half-sister Brown. Whereupon Margaret conveyed the lands to the use of herself for life, remainder to Williams

and his heirs. The marriage took place, and afterwards, Williams sold the lands to the plaintiff, Savage, who entered and built a house thereon.

Mrs. Foster, who was the issue in tail by virtue of the settlement endeavoured to set it up against the title of the plaintiff who was the purchaser. He exhibited a bill against her to have his title established against that settlement, on the ground that she, having full notice of the purchase and of her own title, had given no notice thereof to the plaintiff and, therefore, ought not to be at liberty now to impeach it, though she was a feme covert, but that she should be concluded by this fact as well as if she was an infant.

For the defendant it was argued that two things were necessary to bind the right in cases of this nature. The one was, that the party must know his own title to the lands; and the other, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title. For it would be of dangerous consequence if his bare permission to proceed in the purchase should be a foundation to bind his right in this court on the foot of fraud. It was admitted that the defendant knew she had a title under this settlement, but she apprehended that she was not to take till after her mother's death. She knew likewise that her sister was about to marry Williams, but did not know on what terms. If she had known the terms of that marriage, she was then a feme covert, and her husband ought to have given the plaintiff notice of her title. Therefore, his negligence should not prejudice her who had done nothing to lose her inheritance and the entire benefit of this settlement for ever.

For the plaintiff it was denied that the two matters mentioned by defendant's counsel were necessary to have relief in cases of this nature, the one, that the party should know his own title, and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It was true that he ought to know his own title and that must necessarily be intended in this case, because the defendant had the custody of the deed of settlement. It was not necessary that the person interested should be active or instrumental in carrying on the agreement in order to [effect] a purchase, for if the party knew his own title, there could be no danger that his right should be bound by the purchase, because it was in his power to help himself by giving the purchaser notice of such right; and although this defendant was a feme covert, yet it was a fraud in her not to give the purchaser notice of her right and therefore it should be bound for ever. The more so because the defendant solicited her mother to make this conveyance in favour of Williams on the marriage of her sister, and for that the plaintiff had entered and built on the lands.

Per Curiam: Where there is a parol agreement made for a lease and the lessee, by virtue of such agreement, enters and builds, this court will establish it on the footing of fraud in the lessor, notwithstanding the Statute of Frauds, etc., because contracts executed in part are not always within the statute, although executory contracts are.

This bill is brought to be relieved against a fraud in the defendant who would avoid the plaintiff's title by an elder settlement, although she was privy to and assisting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser. When anything in order to a purchase is publicly transacted, and a third person knowing thereof and of his own right to the lands intended to be purchased, does not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase for it was an apparent fraud in him not to give notice of his title to the intended purchaser. In such case infancy or coverture shall be no excuse for although the law prescribes formal conveyances and assurances for the sales and contracts of infants and femes coverts, which every person who contracts with them is presumed to know, if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness when they act with their eyes open. Yet when their right is secret, and not known to the purchaser but to

themselves or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this court will relieve against that right if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase. Neither is it necessary that such infant or feme covert should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge.

It was decreed that the defendant should levy a fine to the plaintiff to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant should levy the fine quietly and without delay, then the plaintiff should have no costs, otherwise he should pay costs.

Watts v. *Creswell* (1) was now remembered, where tenant for life borrowed money, and his son who was the next in remainder and an infant, was a witness to the deed of mortgage. This court gave relief on the footing of fraud, because the infant did not give the mortgagee notice of his title. So in *Clere* v. *Earl of Bedford* (2), Clere [an infant and clerk to an attorney, had a mortgage on his master's estate and engrossed a subsequent mortgage thereof to another without giving notice that the estate was mortgaged before to him. For that reason his mortgage was postponed on the foot of fraud].

Order accordingly.

DOYLEY *v.* DOYLEY
ATTORNEY-GENERAL *v.* SAME

[Rolls Court (Sir Joseph Jekyll, M.R.), December 1, 1735]

[Reported 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194; 4 Vin. Abr. 485; 32 E.R. 35]

Charity—Charitable bequest—Funds given to trustees to be applied between charitable and non-charitable objects—Apportionment by court.

Where a testator gives funds to be applied partly for objects which are charitable and partly for objects which are not charitable, but does not specify the proportions in which they are to be applied, the court will make an apportionment.

Notes. Considered: *Moggridge* v. *Thackwell*, [1803–13] All E.R.Rep. 754; *Morice* v. *Bishop of Durham*, [1803–13] All E.R.Rep. 451; *James* v. *Allen*, [1814–23] All E.R.Rep. 578. Followed: *Salisbury* v. *Denton* (1857), 3 K. & J. 529. Considered: *Wilson* v. *Duguid* (1883), 24 Ch.D. 244; *Hunter* v. *A.-G.*, [1895–9] All E.R.Rep. 558. Applied: *Re Clarke (Deceased)*, *Bracey* v. *Royal National Lifeboat Institution*, [1923] All E.R.Rep. 607. Referred to: *Cole* v. *Wade* (1807), 16 Ves. 27; *Ellis* v. *Selby* (1836), 1 My. & Cr. 286; *Fordyce* v. *Bridges* (1848), 2 Ph. 497; *Re Douglas*, *Obert* v. *Barrow*, [1886–90] All E.R.Rep. 228; *Re Davis*, *Thomas* v. *Davis*, [1923] 1 Ch. 225.

As to apportionment to the objects of the trust, see 4 Halsbury's Laws (3rd Edn.) 273 et seq.; and for cases see 20 Digest (Repl.) 258 et seq.

Bill filed by some of the testator's relations praying an account and to have a share of an estate, and **Cross-Bill** by the Attorney-General to have the estate applied to charitable uses.

Timothy Wilson, by will dated Mar. 22, 1714, gave all his real and personal estate to two trustees in trust to pay the produce thereof to his niece, Elizabeth Wilson, for her life; and after her death he gave the same to the sons and

daughters of the said Elizabeth Wilson successively, with divers limitations; and in case there should be no issue or they should all die under twenty-one, then the trustees were to dispose of his real and personal estate to such of his relations of his mother's side, who were most deserving, and in such manner and proportions as they should think fit to such charitable use as they should think most proper and convenient.

His mother died without issue. Some of the next-of-kin on the mother's side filed a bill praying an account and to have their share of the estate. A cross-bill was filed by the Attorney-General to have the same applied to charitable uses as the court should direct.

SIR JOSEPH JEKYLL, M.R., after directing the usual accounts and arrangements of the testator's assets, decreed that what shall appear to be the net surplus of the moneys arising from the real and personal estate of the testator, the produce thereof, the same was to be divided into moieties; whereof one moiety was to be distributed, share and share alike, among all the relations of the testator on the mother's side, who were within the degree of third cousins, and were born at the death of the said Elizabeth Wilson, and were now living; and as to the other moiety of the said estate, all parties were to be at liberty to propose schemes before the Master for distributing the same out and out in charity; and herein the several poor relations of the said testator, who shall not be partakers of the other moiety, were cæteris paribus to be preferred. The Master to state to the court what would be the proper scheme, subject to further directions. Report as to one moiety, dated July 13, 1737, whereby forty-two relations were to receive £56 14s. 1½d. each.

Upon further directions, July 26, 1737, Reg. Lib. A. 545, it appeared that the Master certified by his report that he had out of the several schemes laid before him by consent of parties made up one entire scheme for the other moiety out and out in charity according to the terms of the scheme: viz., £400 to eight poor relations of the testator; the like sum to the Westminster Infirmary; and other sums to other public charitable institutions, and among others to the parishes in the town of Guildford.

A

COOK *v.* COOK

[Lord Keeper (Cowper), April 17, 1706]

[Reported 2 Vern. 545; 23 E.R. 952]

Will—Issue "begotten" or "to be begotten"—Issue born after testator's death. B

The words "begotten" and "to be begotten" are the same as well upon the construction of wills as settlements, and take in all issue after begotten.

Therefore, where there was a devise to the issue begotten of J.S., who had a daughter living at the death of the testator and afterwards a son born, **held** the estate should open and take in the afterborn son.

Will—Gift of personal estate to a donee and his children—Exclusion of child born after the testator's death. C

Where there is a gift of personal estate to a man and his children, a child born after the testator's death cannot take.

Will—Concurrent gift—Joint tenancy or tenancy in common—Gift to two daughters and heirs—Joint estate for life and several inheritances—Gift over—Death of devisee without issue—Moiety to remainderman. D

Where there is a devise to the testator's two daughters and the heirs of their bodies the rule is that there is created a joint estate for life and several inheritances. If there is a devise over and one of the devisees dies without issue, her moiety shall go to the remainderman.

Notes. Considered: *Doe d. James* v. *Hallett* (1813), 1 M. & S. 124. Applied: E *Forrest* v. *Whiteway* (1849), 3 Exch. 367. Referred to: *Cray* v. *Willis* (1729), 2 P.Wms. 529; *Gore* v. *Gore* (1733), Kel.W. 254; *Buffar* v. *Bradford* (1741), 2 Atk. 220; *Elliot* v. *Jekyl* (1755), 2 Ves. Sen. 681; *Pickering* v. *Towers* (1758), 1 Eden, 142; *Keene d. Pinnock* v. *Dickson* (1783), 3 Doug.K.B. 313; *Early* v. *Benbow* (1846), 2 Coll. 342; *Edwards* v. *Champion* (1853), 3 De G.M. & G. 202; *Allgood* v. *Blake*, *Roach* v. *Blake*, *Clennel* v. *Blake*, *Reed* v. *Blake* (1873), 29 L.T. 331; *Lock* F v. *Dunlop* (1888), 39 Ch.D. 387.

As to trusts of settlement in default of appointment, see 34 Halsbury's Laws (3rd Edn.) 610; and for cases see 40 Digest (Repl.) 500. As to persons entitled to take under wills children or issue begotten and to be begotten; concurrent gifts, see 39 Halsbury's Laws (3rd Edn.) respectively, 1056, 1102 et seq.; and for cases see 49 Digest (Repl.) 747, 897 et seq. G

Cases referred to:

(1) *Crooke* v. *Brookeing* (1689), 2 Vern. 106; 23 E.R. 679; 49 Digest (Repl.) 753, *7042*.

(2) *Taylor* v. *Sayer* (1600), Cro. Eliz. 742.

(3) *Bate* v. *Amherst and Norton* (1663), T.Raym. 82; 1 Eq. Cas. Abr. 212; 83 H E.R. 45; 48 Digest (Repl.) 476, *4309*.

(4) *Luddington* v. *Kime* (1697), 1 Ld. Raym. 203; 91 E.R. 1031; sub nom. *Loddington* v. *Kime*, 1 Salk. 224; 3 Lev. 431; sub nom. *Lodington* v. *Kime*, 1 Eq. Cas. Abr. 183; 49 Digest (Repl.) 770, *7227*.

(5) *Williams* v. *Jekyl*, *Elliot* v. *Jekyl* (1755), 2 Ves. Sen. 681; 28 E.R. 434, L.C.; 48 Digest (Repl.) 453, *4054*. I

(6) *Sibley* v. *Perry* (1802), 7 Ves. 522; 32 E.R. 211, L.C.; 49 Digest (Repl.) 767, *7200*.

(7) *Radcliffe* v. *Buckley* (1804), 10 Ves. 195; 32 E.R. 819; 49 Digest (Repl.) 753, *7047*.

(8) *Stead* v. *Berier* (*Berrier*) (1679), 2 Show. 63; T.Raym. 408; T.Jo. 139; 89 E.R. 794; sub nom. *Berrier* v. *Stead*, Poll. 546; sub nom. *Steed* v. *Berrier*, 1 Vent. 341; Freem.K.B. 477; sub nom. *Strode* v. *Perryer*, 2 Mod. Rep. 313; sub nom. *Strode* v. *Berager*, 2 Lev. 243; 49 Digest (Repl.) 738, *6901*.

(9) *Wild's Case* (1599), 6 Co. Rep. 16 b.; 77 E.R. 277; sub nom. *Richardson* v. *Yardley*, Moore, K.B. 397; sub nom. *Anon.*, Gouldsb. 139; 49 Digest (Repl.) 945, *8893.*

(10) *Wilkinson* v. *Spearman* (undated), cited in 2 Vern. at p. 545; 23 E.R. 952, H.L.; 49 Digest (Repl.) 899, *8430.*

(11) *Bamfield* v. *Popham* (1703), 1 P.Wms. 54; Holt, K.B. 233; 1 Eq. Cas. Abr. 183, pl. 24; 24 E.R. 290; sub nom. *Bampfield* v. *Popham*, 2 Vern. 449; sub nom. *Popham* v. *Bamfield*, Freem. Ch. 269; 1 Salk. 236; 49 Digest (Repl.) 1218, *11205.*

Bill in equity to construe a will and determine who shall take and what estate, in a devise to the issue of J.S., who then had a daughter living and afterwards had a son born.

LORD KEEPER COWPER.—All the children shall take, and even grandchildren, if there had been any,* but they shall take only an estate for life; and although the devise is to the issue begotten, that makes no difference. The words "begotten" and "to be begotten," are the same, as well upon construction of wills, as settlements, and take in all the issue after begotten. Although on the death of the testator there was then only a daughter born, yet on the birth of another child, the estate shall open and take in the afterborn son. A devise to J.S. and his children: if he has children, they take with their father; but if he has no child, it is an estate tail: *Wild's Case* (9) [rule abrogated: see 39 HALSBURY'S LAWS (3rd Edn.) 1098, note (r)]. A devise to a man and his children of a personal estate: a child born after the death of the testator, shall not take, for it vested on the death of the testator, and shall not be divested. A devise to the testator's two daughters, and the heirs of their bodies: the rule of law is it is a joint estate for life, and several inheritances. The testator never meant that the surviving daughter should turn out the issue of her deceased sister, and that was the point upon the appeal in *Wilkinson* v. *Spearman* (10), where the Lords inclined for the appellant; yet the judges all agreeing that the law was so settled, the Lords would not alter it. A devise to the testator's two daughters and their issue, and in default of such issue to J.S., they have a joint estate for life, and several inheritances; if one of the daughters dies without issue, there shall not be cross-remainders, but her moiety shall go over to the remainderman on the death of the daughter for want of such issue, i.e., such respective issue. A devise to the issue of B. and for want of such issue to C., B. having a son and a daughter, they shall take only as persons described, and have only an estate for life, although the subsequent words, for want of such issue, seem to imply an estate tail. But, then, there must be a double use made of the word issue, viz., first, it is a word of implication, who were the persons to take; secondly, as words of limitation to make an entail, which is not to be admitted.

In *Chute* v. *Parker*, or *Tilt* v. *Parker*, there was a devise to the son for life, and to his first and other sons in tail; and for want of such issue, to his daughter Parker. It was made a question whether those last words, for want of such issue, gave the son an estate tail by implication. The matter ended by compromise; but

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* Vide on this head *Crooke* v. *Brookeing* (1), and cases cited in not. 2 Vern., p. 108, there; and in addition, *Taylor* v. *Sayer* (2); *Bate* v. *Amhurst and Norton* (3), where BRIDGEMAN, C.J., says: "The case of *Taylor* v. *Sayer* (2) is not law." So *Luddington* v. *Kime* (4); *Elliot* v. *Jekyl* (5); *Sibley* v. *Perry* (6). It is clear the court will not extend the meaning of the word children to grandchildren, except from necessity, as if the will would otherwise be inoperative, or where by other words, as "issue," it clearly appears that the word children was used not in the proper but more extensive sense; nor would the court alter the construction upon inference from the testator's knowledge of the circumstances of the family: *Radcliffe* v. *Buckley* (7). And see *Stead* v. *Berrier* (8) (T. Raym. 408), where per SIR THOMAS RAYMOND, neither the word son or child is ever taken for grandchild. As to the word parent, it seems that has been construed grandfather: *Sibley* v. *Perry* (6).

the same question came afterwards in judgment in *Popham* v. *Bamfield* (11) and adjudged that the devisee having an express estate for life, it could not be enlarged, nor he take an estate tail by implication.

Order accordingly.

WILKES *v.* R.

[House of Lords, January 16, 1769]

[Reported 4 Bro. Parl. Cas. 360; Wilm. 322; 4 Burr. 2527; 19 State Tr. 1075; 2 E.R. 244]

Criminal Law—Sentence—Imprisonment—Commencement on termination of sentence already passed.

A sentence of imprisonment on a defendant to commence in the future, i.e., from and after the termination of a sentence of imprisonment already passed on him for another offence, is good in law.

Criminal Law—Information—Filing by Solicitor-General—Vacancy of office of Attorney-General.

A criminal information for an offence is a surmise or suggestion on record on behalf of the King to a court of criminal jurisdiction and is to all intents and purposes the King's suit. It may be filed by the Solicitor-General during a vacancy of the office of Attorney-General.

Notes. Considered: *Castro* v. *Reginam*, [1881–5] All E.R.Rep. 429; *R.* v. *Albury*, [1951] 1 All E.R. 491. Referred to: *Moody* v. *Stracey* (1812), 4 Taunt. 588; *Butt* v. *Conant* (1820), 1 Brod. & Bing. 548; *O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155; *Eastern Archipelado* v. *R.* (1853), 2 E. & B. 856; *R.* v. *Newton* (1855), 4 E.B. 869; *R.* v. *Cutbush* (1867), L.R. 2 Q.B. 379; *R.* v. *Martin*, [1911] 2 K.B. 450; *R.* v. *Greenberg*, [1943] 1 All E.R. 504.

As to criminal informations and consecutive sentences, see 10 Halsbury's Laws (3rd Edn.) 380, 492, 493. For cases see 14 Digest (Repl.) 394 et seq.; 565–567.

Cases referred to:

(1) *Prynn's Case* (1690), 5 Mod. 459; sub nom. *R.* v. *Berchet*, 1 Show. 106; 14 Digest (Repl.) 395, *3830*.

(2) *R.* v. *Benson* (1670), 1 Vent. 33.

Appeals from decisions of the Court of King's Bench.

In Michaelmas Term, 1763, Sir Fletcher Norton, his Majesty's Solicitor-General (the office of Attorney-General being vacant) filed an information ex officio in the Court of King's Bench against the appellant, John Wilkes, stating that before the printing and publishing of the seditious and scandalous libel thereinafter mentioned, to wit, on April 19, 1763, His Majesty did make and deliver a most gracious speech from his throne to the purport and effect therein set forth, and that the said John Wilkes most audaciously, wickedly, and seditiously devising and intending to vilify and traduce His Majesty and his government of this realm, to impeach and disparage his veracity and honour, and to represent and cause it to be believed among His Majesty's subjects that his said most gracious speech contained falsities and gross imposition upon the public, and that His Majesty had suffered the honour of his Crown to be sunk, debased, and prostituted, and had given his name as a sanction to the most odious measures of government, and also most wickedly, unlawfully, and seditiously devising, intending, and endeavouring, as far as in him the said John Wilkes lay, to excite disobedience and insurrections among the subjects of this realm, and to violate and disturb the public tranquility,

A good order, and peace of this kingdom. After the making and delivery of the aforesaid speech, that is to say on Aug. 2, 1763, Wilkes, it was alleged, unlawfully, wickedly, seditiously, and maliciously published, and caused to be printed and published, a certain malignant, seditious, and scandalous book and libel, entitled THE NORTH BRITON, in one part whereof, No. 45, dated Saturday, April 23, 1763, were then and there contained divers malicious, seditious, and scandalous B matters, to the effect in the information set forth.

To this information Wilkes pleaded not guilty, and Sir Fletcher Norton, then being His Majesty's Attorney-General, joined issue in that character for His Majesty.

In 1764 the cause was tried by a special jury of the county of Middlesex, and Wilkes, after a full and fair trial, was convicted of the offences charged in the in- C formation. He having withdrawn himself into parts beyond the seas, proceedings to outlawry were had against him upon this conviction, and on Nov. 1, 1764, he was outlawed, but in Easter Term, 1768, he was apprehended by the sheriff of Middlesex, by virtue of a writ of capias utlagatum, and, being brought into the Court of King's Bench, was committed to the custody of the marshal of that court. In the same term, Wilkes obtained a writ of error upon the outlawry, and, having D assigned errors thereon, the same were argued in that and the following term, when the Court of King's Bench reversed the outlawry for a defect of form in the return of the sheriff to the writ of exigent.

Wilkes's counsel having surmised to the court some matters, which, if available, ought to have been moved in arrest of judgment and for a new trial, the court relaxed their general rule requiring such applications to be made within the first E four days of the term immediately following the conviction, and indulged Wilkes with leave to move now as well in arrest of judgment as for a new trial. Accordingly, the ground of the motion in arrest of judgment was to the information having been exhibited by the Solicitor-General, and it was argued by counsel for Wilkes that the Solicitor-General was not the proper officer, nor had any authority to exhibit an information; if he was vested with such authority, it could only be F temporary, during the vacancy of the office of Attorney-General, and it did not appear by the proceedings that the office of Attorney-General was at that time vacant. The application for a new trial was founded upon an objection to an order made by LORD MANSFIELD C.J., of the Court of King's Bench, for amending the information after issue had been joined, and the record of the issue made up. The court unanimously overruled both the objections, and took time to consider G the judgment upon the conviction till June 17, 1768, when Wilkes, being brought into court to receive judgment, was sentenced to pay a fine of £500 and to be imprisoned for ten calendar months in the custody of the marshal.

There was another information against Wilkes for publishing an obscene and impious libel entitled AN ESSAY ON WOMAN, which was filed in the same manner and tried at the same time with the other. On this latter information he was sen- H tenced to pay another fine of £500 and to be imprisoned for twelve calendar months, to be computed from the determination of the first imprisonment.

To reverse these judgments, Wilkes brought two several writs of error in Parliament, and assigned the following matters for error: (i) that it did not appear that Sir Fletcher Norton, by whom the informations were exhibited, had any lawful power, warrant, or authority to exhibit them, and, therefore, the judgment was I not sufficient in law to convict him (Wilkes) and to ground the aforesaid sentences against him; (ii) that Wilkes was sentenced to be imprisoned for twelve months to commence at a future time, whereas such imprisonment ought to have commenced at and from the time of giving the judgment and not at any future time; (iii) that there was a variance between the record and the original information, consisting in altering the word "purport" to that of "tenor."

In support of these errors it was argued that the informations were exhibited and filed by Sir Fletcher Norton, as His Majesty's Solicitor-General, ex officio, when by virtue of such office he had no general authority to do so, nor did it

appear that he had any special authority. Much doubt was formerly entertained, by those who were most eminently distinguished for their knowledge of the criminal laws of this country, whether any criminal informations were lawful. The constructions of Magna Carta, c. 29, some ancient statutes, and books of the law, declare and agree that no man can be charged but by indictment or presentment. In *R.* v. *Berchet* (1) (5 Mod. Rep. at p. 460) and there called *Prynn's Case* (1), Sir Francis Winnington averred, that SIR MATTHEW HALE, C.J., had often said that

> "if ever informations came in dispute, they could not stand, but must necessarily fall to the ground."

It is admitted, however, that the Court of King's Bench in that case held that informations lay at common law.

The question, therefore, in the present case was who are the officers known to the law and described in the law books as the persons with whom only this right of exhibiting informations ex officio rests? It may be clearly collected, from the authority of the legislature and the law books that these officers were only the King's Attorney-General and the King's Coroner, to which latter is always added in such cases the title of "Attorney" also. No Act of Parliament, no law book, mentions any other officer as having this power in any case or under any circumstances. From the King's Coroner this power was taken away by the statute of 4 Will. & Mary, c. 18 [1692, dealing with malicious informations: repealed 1938], and was then left in the Attorney-General only. SERJEANT HAWKINS in his Pleas of the Crown, vol. 2, p. 268, observing upon that statute's taking away this power from the King's Coroner says, "whence it follows that informations exhibited by the Attorney-General remain as they were at common law." Such informations can only be exhibited in the Court of King's Bench, of which court the King's Attorney-General, and the King's Coroner and Attorney, commonly called the Master of the Crown Office, are officers upon record, and have their known seats and places there as such.

SIR BARTHOLOMEW SHOWER in his reports, p. 114, in *R.* v. *Berchet* (1) argues and observes upon the statute 31 Eliz., c. 5 [1588: common informers: repealed 1959] and its proviso in s. 3, providing that that Act shall not extend to any such officers of record as have, in respect of their offices, theretofore lawfully used to exhibit informations that

> "it is the judgment of Parliament that there were officers to exhibit them, and those that are meant must be the Attorney and his deputy the Coroner, for I know of no other."

It may be thought that SIR BARTHOLOMEW SHOWER is inaccurate in calling the Coroner deputy to the Attorney, because the Coroner has a superior seat in the Court of King's Bench to the Attorney, but he must be understood to speak of the Coroner as deputy only in this instance, he not having equal power with the Attorney over the information when exhibited. For the Coroner cannot put a stop to it, even though he should have the King's warrant under his sign manual for the purpose, yet the Attorney-General can, by virtue of his office, stop it at once by a nolle prosequi, which appears by *R.* v. *Benson* (2). SIR BARTHOLOMEW SHOWER says further (1 Show. at p. 120):

> "In case of malicious prosecution, no action lies against the Attorney or Coroner, any more than against a grand juror or prosecutor; because they are upon their oaths, and so the Attorney and Coroner are here as officers upon record."

At p. 122, he says:

> "The way of apprising the court is, by dedit curiæ hic intelligi et informari, before any process, which is done by a sworn officer filed of record."

If it be contended that during the vacancy of the office of Attorney-General,

his authority, in this respect, devolves upon the Solicitor-General, it is answered that no law book or judicial determination warrant that argument. It is admitted, that there are some modern instances in the Rolls of the Crown Office of informations filed by the Solicitor-General ex officio, some of which describe the vacancy of the office of Attorney-General as if that was the circumstance from which the Solicitor-General derived his authority and raised himself to this power, but as the others are silent about such vacancy they must prove a general authority, or nothing, because, if a special authority is to give the title, it must, by the rules of law, be set forth in the record, for nothing out of the record can warrant the judgment upon the record. There does not, however, appear to be one instance of a litigation or judicial opinion concerning such informations filed by the Solicitor-General. In the present case it appeared from the records that the Attorney-General became the prosecutor before the judgments were given, but no subsequent adoption by the Attorney-General of these illegitimate offspring could sanctify their birth. If the informations were bad when filed, no subsequent act whatever could make them good.

Wherefore, as the legislature have not substituted, or meant to substitute, the Solicitor-General or any other person or persons in the room of the Coroner from whom they took this power, or in the place of the Attorney-General during the vacancy of that office, it being always in the power of the King to supply that vacancy at any moment he pleased; as the legislature has left the Attorney-General the only known officer in law authorised to exhibit criminal informations ex officio; as the Solicitor-General is no sworn officer of the Court of King's Bench, either filed of record or otherwise; as all the law books are confidently silent about any power lodged with him for that purpose; as this power has of late time only been usurped by the Solicitor-General in some modern instances, and those too varying in their form as if he did not know on what ground he claimed or exercised the power; and as he appeared to have no warrant or authority to act in this instance as attorney for the Crown; it was submitted by the appellant that the informations in question were filed without any lawful authority, and for that reason were fundamentally bad and void so as not to warrant any judgments upon them against him.

As to the second error, it was said that all judgments in law, as they affect either the property or the persons against whom they are given, ought to contain in them the clearest and most precise certainty and to take immediate effect, more especially such judgments as lay a restraint upon the liberty of the persons of His Majesty's subjects. The present judgment was deficient in both these points. (i) It did not take immediate effect, but was to commence in futuro, viz., after the determination of another imprisonment inflicted upon the appellant by another judgment, given upon a different record, and totally unconnected with this. (ii) It did not contain any precise certainty, it being uncertain when the first imprisonment would determine, upon the determination of which alone the imprisonment under this judgment was to commence. If the judgment sentencing him to the first imprisonment should be found erroneous, it was not easy to say upon this record whether all the first imprisonment previous to the reversal of the judgment was to be held for nothing, and the twelve months be computed from the time of the reversal only or from the commencement of the first imprisonment, all of which would be unlawful. Who was to be the judge of this? Was it to be left to the discretion of the marshal how to settle the computation? Or was the prisoner to go through another expensive litigation in the Court of King's Bench by way of petition or motion to be discharged? If judgments could lawfully commence in futuro, they might as well commence at a long as at a short date, and would in that case be the instrument of great oppression, not by the immediate execution of present and certain punishments, but by holding suspended terrors over the heads of those who were the objects of them.

As to the third error, the plaintiff having obtained writs of certiorari to bring in the original informations and those writs having been returned, it was admitted

that the records and the original informations were consistent and that there was no variance between them. Therefore, the plaintiff was precluded from making any objection with respect to the propriety of the amendments which had been made.

In answer to these several heads of error, and the reasoning in support of them, it was said:

(i) That an information for an offence is a surmise or suggestion upon record on behalf of the King to a court of criminal jurisdiction, and is, to all intents and purposes, the suit of the King, and it would be difficult to assign a reason why His Majesty should not have equal liberty with the subject of commencing and prosecuting his suits by those persons whom he thinks fit to confide in and employ. The Attorney-General and the Solicitor-General are invested by their offices with general authority to commence and prosecute the suits of the Crown. It is true that the Attorney-General, as the superior officer, has the direction and control of His Majesty's prosecutions in which the Solicitor-General seldom interferes, but it is equally true that during the vacancy of the office of Attorney-General all the suits of the Crown, both criminal and civil, are commenced, prosecuted, and carried on by the Solicitor-General. When these informations were filed against Wilkes the office of Attorney-General was vacant, and, consequently, the Solicitor-General was the proper officer to exhibit them. It is said that the fact of the vacancy ought to appear upon the record. The only pretence for such an averment is to inform the court of the vacancy as an inducement to receive the information from the Solicitor-General, but there is no necessity for that intelligence. The Attorney-General is, in truth, an officer of and has a place in the Court of King's Bench, and the court will take notice of the vacancy of the office. There are multitudes of instances of suits commenced and prosecuted by the Solicitor-General on behalf of the Crown without any averment or notice taken of the vacancy of the office of Attorney-General. Even if the circumstance of an information being filed by the Solicitor-General furnished any real ground of objection to the prosecution, yet it was conceived that the appellant was now precluded from availing himself of it. It could at most amount only to an irregularity, and the remedy must have been by application to the court to have the information taken off the file or the proceedings stayed. It could never be a cause of demurrer, or of arrest of judgment, or a ground of error; and Wilkes, having pleaded to the offence, had waived any advantage of that irregularity. Besides, the Solicitor-General having, during the suit, been appointed Attorney-General, adopted the information, joined issue with the plaintiff in error, and prosecuted the suit to a conviction.

(ii) With regard to the error assigned in the judgment that the imprisonment was to commence at a future day, it was apprehended that the judgment was given in that manner with the strictest propriety. The court meant that Wilkes should undergo twelve months' imprisonment for this offence, which could not be inflicted in any other manner. It would have been absurd to have made the imprisonment to commence immediately, Wilkes being already under another sentence of imprisonment for ten months, and in that case would in effect have only suffered an imprisonment of two months when the court, on account of the enormity of the offence, intended he should be imprisoned for twelve months. As that space of time was to be the measure of his imprisonment for this offence, it could not effectually have been inflicted in any other manner unless the court had sentenced him to be imprisoned for twenty-two months, to commence immediately, and then there would have remained twelve months after the end of the ten months' imprisonment, which he had before been sentenced to. But that might be attended with hardship and injustice to Wilkes, by his being imprisoned a longer time than the court meant for the present offence, for if by the grace of the Crown, or by any means, the ten months' imprisonment should be pardoned, avoided, or shortened, Wilkes under a sentence of twenty-two months' imprisonment would be confined from the moment the former imprisonment should expire

A until the end of the twenty-two months, which would exceed twelve months' imprisonment when the court intended to inflict an imprisonment of twelve months only. Under the circumstances of this case there was no incongruity in the imprisonment commencing at a future time, and if there was any novelty in it, it was to be attributed to the accumulated guilt of its object.

(iii) The third and last error assigned was upon a supposed variance between B the record and the original information, but the fact did not warrant that objection. It was conceived that this supposed error was so assigned for the purpose only of introducing into the cause a matter which Wilkes had thought proper frequently to allege as a subject of grievance and complaint. For, though there was not the least colour for the complaint, yet, as the manner in which it had been urged seemed to touch upon the honour of the Crown in the administration of C justice and highly to concern the credit and dignity of His Majesty's Court of King's Bench, it was greatly to be lamented that it could not be brought judicially before the House on this occasion, the real truth of the case being no more than this. By the order of the Attorney-General, a summons was directed to be applied for after issue joined and before the trial from one of the judges of the court in the usual course of business, and a summons was accordingly applied for and ob- D tained from Lord Mansfield, C.J., for an attendance to show cause why the information should not be amended by altering the word "purport" to that of "tenor" throughout the information except in the first place, which, upon such attendance by the clerks in court on both sides, was ordered accordingly and the amendment made. Wilkes's counsel made no objection to this on the trial nor in the ensuing term, as might have been done, nor until Trinity Term, 1763, E when that amendment was made one ground of a motion in arrest of judgment. But, as such an objection could not be regularly made in arrest of judgment, the court gave him leave to make it upon a motion for a new trial. The same was accordingly made, when, it clearly appearing that the amendment was made in conformity to a multitude of precedents and the constant usage of the court, that it was not, nor could be, of any prejudice to the defendant, and that he himself, F instead of complaining of it, had acquiesced in it, the court unanimously overruled the objection as a point on which no doubt could be entertained.

After counsel had been heard on these writs of error, the following questions were put to the judges: (i) whether an information filed by the King's Solicitor-General, during the vacancy of the office of the King's Attorney-General is good in law; (ii) whether in such a case it is necessary in point of law to aver upon the G record, that the Attorney-General's office was vacant; (iii) whether a judgment of imprisonment against a defendant to commence from and after the determination of an imprisonment to which he was before sentenced for another offence is good in law. The Lord Chief Justice of the Court of Common Pleas, having conferred with the rest of the judges, delivered their unanimous opinion upon the first and third questions in the affirmative and upon the second in the negative. H Whereupon it was ordered and adjudged that the judgments of the Court of King's Bench should be affirmed.

Appeal dismissed.

LORD HASTINGS *v.* DOUGLAS

[Court of King's Bench (Richardson, C.J., Berkeley, Jones and Sir George Croke, JJ.), 1634]

[Reported Cro. Car. 343; W.Jo. 332; 79 E.R. 901]

Husband and Wife—Paraphernalia—Jewels worn by wife during husband's lifetime—Devise to wife of "use and occupation" of jewels till death or remarriage with gift over.

A husband devised to his wife "the use and occupation" of certain jewels possessed by him, "she giving good security to my daughter L. to deliver and leave the same to my said daughter at the day of her death or second marriage."

Held: this was not a condition, but a limitation, and, though the wife usually wore the jewels during her husband's lifetime, she could not retain them as paraphernalia becoming her property on the death of her husband in view of the specific devise of the use of them only.

Notes. Under the Law Reform (Married Women and Tortfeasors) Act, 1935 (11 Halsbury's Statutes (2nd Edn.) 811) a married woman is now capable of acquiring, holding, and disposing of any property as if she were a feme sole. As to spouses' rights of action in tort against each other, see Law Reform (Husband and Wife) Act, 1962 (42 Halsbury's Statutes (2nd Edn.) 333).

Referred to: *Smith* v. *Clever* (1688), 2 Vern. 59.

As to paraphernalia, see 19 Halsbury's Laws (3rd Edn.) 838; and for cases see 27 Digest (Repl.) 102, 103.

Cases referred to:

(1) *Bransby* v. *Grantham* (1577), 2 Plowd. 525; 75 E.R. 776; 38 Digest (Repl.) 27, *125*.

(2) *Bracebridge* v. *Cook* (1572), 2 Plowd. 416; 75 E.R. 628; 48 Digest (Repl.) 27, *123*.

(3) *Viscountess Bindon's Case* (1584), 2 Leon. 166.

(4) *Welcden* v. *Elkington* (1578), 2 Plowd. 516.

Trover and **Conversion** for divers jewels.

Serjeant Sir John Davy was possessed of 65 large pearls, 65 small pearls, and a diamond chain, and, being so possessed, he made his will, and thereby devised the use and occupation of all his plate, hangings, and jewels to Dame Elionor, his wife, during her widowhood,

> "she giving good security to my daughter Lucy, Lady Hastings [wife of the plaintiff], to deliver and leave the same to my said daughter Lucy at the day of her death or second marriage which should first happen."

He died possessed of these jewels, and after his death the administration of his goods was committed to the plaintiff. Elionor, the wife of Sir John Davy, was the daughter of Lord Audley, Earl of Castlehaven, and during the life of Sir John Davy she used the jewels, and "ut ornamenta corporis sui" usually wore them. After her husband's death she married the defendant, Sir Archibald Douglas. The jury found that he had converted the jewels, and, if the court should adjudge for the plaintiff, they found for the plaintiff, with damages £370.

Upon this special verdict, it was argued at the Bar by *Germyn*, for the plaintiff, and by *Calthrop*, for the defendant; and now it was openly argued at the Bench.

BERKELEY and **JONES, JJ.**, argued, for the defendant, that Elionor, being the daughter of a nobleman, and permitted to use jewels frequently, "ut ornamenta corporis sui," and they being convenient for her degree, she should have them as her paraphernalia, and when there be not debts to be paid (as it does not

A appear there were any) she shall have them against the executors or administrators of her husband, and the husband cannot dispose of them from his wife by his will, but instantly by his death, the possession of them being in the wife's custody, the property is vested in her and the husband cannot give them away. That is of necessity and for conveniency in the law, for it is not reasonable that the husband should leave her naked of those jewels which she usually did wear, and B are fit (according to her calling) to wear. It appears by LINWOOD that the wife against her husband's will has such an interest in goods which are her paraphernalia, and that her husband has nothing to do with them, but she may make a will of them in her husband's lifetime, and may dispose of them in vita mariti invito marito. But, they said, it is not allowable in our law that she should dispose of them in her husband's lifetime, and when the husband does not dispose C of them, they are instantly vested in the wife. Although the husband may make a gift of them in his lifetime, yet he cannot make a will to dispose of them. They compared it to the case where a wife has a term and takes husband; he may give and dispose thereof in his lifetime, but he cannot dispose of it by his will, as in *Bransby* v. *Grantham* (1), and *Bracebridge* v. *Cook* (2), and in the case 1 Hen. 5, "Executor," 108. The King may give the jewels of his crown by letters patent, D but he cannot by his testament dispose of them: WOOD'S INST. 110; CRO. ELIZ. 464, 682. [But see 7 HALSBURY'S LAWS (3rd Edn.) 321 (i).]

BERKELEY, J., said that permission to the wife to wear them usually was as a gift of them to her by her husband. He compared it to the case of 11 Hen. 4, pl. 83, where one takes my son and clothes him or my wife and clothes her, it is E as it were a gift of the said apparel to them. As by the custom of London and in some places in Wales the wife shall have the moiety of the goods whereof her husband dies possessed, yet her husband in his lifetime may give all the goods, but by his will he cannot prejudice her concerning her part, whence he concluded, that Elionor should have them notwithstanding the will.

F **JONES, J.,** said that by the civil law, as the condition to tie her from marriage, so the limitation to have those jewels during her widowhood was void, because she was absolutely possessed of them.

Whereupon they concluded that judgment should be given for the defendants.

But **RICHARDSON, C.J.** and **SIR GEORGE CROKE, J.,** argued to the con- G trary, that this was a good will, and that Elionor might not take the jewellery but according to the will. If the husband has not made a will, but has left the jewellery to the disposition of the law, and the question is between the executor or administrator and the wife, where there be not any debts or legacies to be paid, or where there be assets to pay all debts and legacies besides those jewels, there peradventure the law will allow her to take and enjoy them as her paraphern- H nalia, but where the husband has made a will and limited how she shall have them, she ought to take them as the husband appointed, and his will is as good and as well to be performed as his gift in his lifetime. The present is not like the case of 11 Hen. 4, pl. 83, for there it is a good gift to the son and to the wife by the ravisher, and the husband may well assent to them. So are the cases of 11 H. 4, pl. 12, and 34 Hen. 6, pl. 10, that goods dedicated to the service of I a chapel or church are a good gift to the wardens of them in law, but this permission by the husband for the wife to wear them cannot be a gift of them in deed or in law, for the husband cannot give aught to the wife, they being both but one person in law.

As to the objection that, although a husband may dispose of them by act in his life, yet he cannot by his will, it was answered: True it is that a man who has a thing real in another's right, as a term, although he may give, yet he cannot devise it, as in *Bracebridge* v. *Cook* (2). So where an executor makes a gift of goods which he has as executor, it is a good gift, but a devise of them is not

good, because he has them in auter droit. Of all chattels personal, although the wife had them before marriage, the absolute property by the marriage is vested in the husband, and he may give them in his life or dispose of them by his will. So of those goods which are termed paraphernalia the absolute property is in the husband, and, therefore, he may well devise them. And to the cases that the husband may by gift of all his good bona fide prevent his wife that she shall not have any part of them, notwithstanding the custom in London, Wales, and elsewhere, yet by his will, if he devises them, it shall not frustrate what she ought to have by the custom, they agreed to be good law, for custom is another law, and instantly by the death of the husband fixes the interest in the wife. The goods which she claims as paraphernalia be not given to the wife, but those which are of necessity and conveniency for her, and when the husband leaves her what is for her necessity, viz., necessary apparel, he may well make a disposition of the residue by his will; for that purpose was cited 19 Hen. 6, pl. 14. A wife may not take anything unless for necessity, and where the civil law says that she may make a will in the life of her husband of her paraphernalia, yet the common law, whereby we are to be guided, is expressly contrary to it, that she may not make a will of any goods but with her husband's assent, and then it is as his own gift, but of an obligation or things in action a wife may make executors by assent of her husband, and may make her husband her executor, as appears by the books 4 Hen. 6, pl. 31; 39 Hen. 6, pl. 27; 3 Edw. 3, "Devise," 12; 26 Edw. 3, pl. 71. The interest and possession, and property of such goods as are called paraphernalia are in the husband, and he may devise them to his wife, and that she shall take them by the devise appears by 33 Hen. 6, fo. 31, pl. 5, where he devised to his wife her apparel, and she justified the taking of them by the devise and delivery of the executor; 37 Hen. 6, pl. 28, that she ought to take only her necessary apparel; 2 Dyer, 166; 18 Edw. 4, pl. 11; 12 Hen. 7, pl. 23, pl. 24, that the property and possession of those goods be in the husband, and she may not make a will of them without her husband's assent.

A case was cited in the Exchequer in Trinity Term, 1585, betwixt the Lord Treasurer and others, executors of Viscount Bindon, against Mary Viscountess Bindon [*Viscountess Bindon's Case* (3)]. In an action of trover and conversion of jewels of the value of £1,000 she pleads to all besides such jewels (which were a chain and bracelets not exceeding the value of £160), not guilty, and as to them she pleads that she was the wife of Viscount Bindon at the time of his death and she usually wore those jewels as ornaments of her body, and avers that the executor had assets to satisfy his funeral and all his debts and legacies besides those jewels. Issue was taken that they had not assets to satisfy all the debts and legacies besides those goods, so thereby it is to be observed that jewels of £160 for a viscountess were not allowable for paraphernalia. It was answered, although here in the present case the defendant be the daughter of an ancient baron of this realm and of an earl in Ireland, yet being married to Serjeant Davy, she ought to have them as his wife. There is not any necessity she should have a chain of diamonds, the sixty-five great pearls, and the sixty-five small pearls, which are things hanging loose, and are not in any chain or bracelets, and they be not for any necessity, for ornament, or for covering. But quacunque via data, the husband having expressly disposed of them by his will, she may not against his will take them without the assent of the administrator and without delivery, and not of her own head detain them without entering security. Where it is alleged, that in the civil law a condition to restrain a second marriage is not allowed, this is no condition, but a limitation only, and it is reasonable she should take accordingly. It was alleged that this is not any devise of those jewels, but only the use and occupation of the plate, hangings, and jewels during her widowhood, and no absolute gift of them as is in the case of the Grail [Y.B. 37 Hen. 6, fo. 30, pl. 11], and in *Welcden* v. *Elkington* (4).

They concluded that it is a good disposition by the will and a declaration of

his interest, and takes away that which otherwise she might claim by the law, and his express declaration controls any implied gift, as is pretended. Forasmuch as she has not performed it, the limitation is determined, and neither she nor her husband can have them. Wherefore,

Judgment for plaintiff.

FOWLER *v.* FOWLER

[LORD CHANCELLOR'S COURT (Lord Talbot of Hensol, L.C.), Easter Term, 1735]

[Reported 3 P.Wms. 353; 24 E.R. 1098]

Will—Satisfaction—Legacy satisfying debt—Debt incurred before will—Widow's claim for arrears of pin-money—Rebuttal of presumption—Parol evidence.

Where a testator leaves to his creditor a legacy of a sum which is equal to or more than the debt the legacy will be presumed to be a satisfaction of the debt, provided that the debt has been incurred at the date of the will, for an intention to satisfy a debt not existing at the date of the will cannot be imputed to the testator. The presumption will apply to a claim by a widow for arrears of pin-money which may be satisfied by a legacy from the husband of an equal or greater amount. Parol evidence may be admitted to rebut the presumption and prove the intention of the testator to give the legacy exclusive of the debt.

Husband and Wife—Pin-money—Arrears—Recovery by wife—Provision by husband of necessaries.

Where pin-money is secured to a wife and it appears that the husband notwithstanding has provided her with clothes and other necessaries this will be a bar to any demand for arrears of pin-money arising during the time in which the provision was made by the husband.

Notes. Considered: *Digby* v. *Howard* (1831), 4 Sim. 588. Distinguished: *Taylor* v. *Taylor* (1859), 33 L.T.O.S. 88. Applied: *Atkinson* v. *Littlewood*, [1874–80] All E.R.Rep. 203. Referred to: *Wallace* v. *Pomfret* (1805), 11 Ves. 542; *Re Rattenbury, Ray* v. *Grant*, [1906] 1 Ch. 667.

As to the equitable doctrine of satisfaction, see 14 HALSBURY'S LAWS (3rd Edn.) 598–609, and as to pin-money, see ibid., vol. 19, pp. 838, 839. For cases see 20 DIGEST (Repl.) 472 et seq.; 27 DIGEST (Repl.) 155, 156.

Cases referred to:

(1) *Lady Dowager Granville* v. *Dowager Duchess of Beaufort* (1709), 1 P.Wms. 114, L.C.; reversed sub nom. *Dowager Duchess of Beaufort* v. *Lady Dowager Granville* (1710), 3 Bro. Parl. Cas. 37; 1 E.R. 1161, H.L.; 48 Digest (Repl.) 424, *3724*.

(2) *Ball* v. *Smith* (1711), 2 Vern. 675.

Bill in administration of an estate.

The defendant's deceased husband, in consideration of a marriage then intended, and afterwards solemnised and of a considerable portion brought by the defendant, settled £100 per annum in trust for her separate use as pin-money. Two years' arrears became due. The husband then made his will, wherein, expressing great affection for his wife, he gave her a legacy of £500. After the making of the will another year's arrear incurred, and then the husband died. The question was whether the £500 legacy, being more than was due for pin-money, should be deemed a satisfaction for the arrears.

LORD TALBOT OF HENSOL, L.C., admitted it to have been the general practice, where there was a debt due from the testator to a third person and the legacy given to such person was as much as or more than the debt, to hold such legacy to be a satisfaction of the debt. This being established as a rule, it had with great reason been urged in opposition to the maxim that a man ought to be just before he is bountiful, and though, where there were assets, the testator might with as much reason be construed both just and bountiful, yet it must be of very ill consequence to unsettle or alter a settlement.

Secondly, though in some cases parol evidence had been admitted in order to show that the testator designed to give such a legacy exclusive of the debt, yet His Lordship said his opinion was not to admit such evidence, for then the witnesses, and not the testator, would make the will.

Thirdly, admitting this to have obtained as a general rule, it was next to be considered whether a wife ought to be excepted out of such general rule. It was true that there had been, on some occasions and in some particular cases, a distinction made in favour of a wife so as to prefer her to any other legatee, as in *Dowager Duchess of Beaufort* v. *Lady Dowager Granville* (1) in the House of Lords, and *Ball* v. *Smith* (2), by Lord Harcourt, where the wife, being executrix and having an express legacy, was held also entitled to the undisposed surplus, yet even with regard to this the court had varied in their determinations. However, since no precedent had been alleged in favour of the wife, as to the point in question, he thought that, the legacy given to her being greater than the debt, it ought to be construed a satisfaction of the debt, and that there was no reason to except the wife out of the general rule.

Fourthly, but the legacy could not be pretended to be a satisfaction of a debt incurred after the date of the will, and which at that time might possibly never become due.

Fifthly, where pin-money was secured to the wife and it appeared that the husband notwithstanding provided the wife with clothes and other necessaries, this, during such time as the wife was so provided for by the husband would be a bar to any demand for her arrears of pin-money.

A

MOSES *v.* MACFERLAN

[Court of King's Bench (Lord Mansfield, C.J., Denison, Foster and Wilmot, JJ.), April 26, May 19, 1760]

[Reported 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676]

B *Money Had and Received—Action—Equitable action to recover money which ex aequo et bono defendant ought to refund—Money irrecoverable from payer at law—Mistake—Failure of consideration—Money got by oppression.*

Per Lord Mansfield, C.J.: The action for money had and received, an equitable action to recover money which the defendant ought not in justice to keep, is very beneficial, and, therefore, much encouraged. It lies only for money C which ex aequo et bono the defendant ought to refund. It does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty although it could not have been recovered from him by any course of law, as, e.g., in payment of a debt barred by the Statute of Limitations or contracted during infancy, where the defendant may retain it with a [clear] conscience though by positive law he was barred by recovering. D But it lies for money paid by mistake, or on a consideration which fails, or for money got through imposition, extortion, oppression, or undue advantage taken of the plaintiff's position.

Notes. Doubted: *Phillips* v. *Hunter* (1795), 2 Hy. Bl. 402. Distinguished: *Marriott* v. *Hampton*, [1795–1802] All E.R.Rep. 631. Applied: *Walker* v. *Constable* (1798), 1 Bos. & P. 306. Considered: *Johnson* v. *Johnson* (1802), 3 Bos. E & P. 162; *Brisbane* v. *Dacres* (1813), 5 Taunt. 143; *Persian Investments* v. *Kahn* (1893), 37 Sol. Jo. 340; *Phillips* v. *London School Board*, *Cockerton* v. *London School Board*, [1898] 2 Q.B. 447; *Jacobs* v. *Morris*, [1901] 1 Ch. 261; *Re Bodega Co.*, [1900–3] All E.R.Rep. 770; *Lodge* v. *National Union Investment Co., Ltd.*, [1904–7] All E.R.Rep. 333. Doubted: *Baylis* v. *Bishop of London*, [1911–13] F All E.R.Rep. 273; *Sinclair* v. *Brougham*, [1914–15] All E.R.Rep. 622. Considered: *Sharp and Knight* v. *Chant*, [1917] 1 K.B. 771; *Re Mason* (1928), 97 L.J.Ch. 321; *Re Simms*, *Ex parte The Trustee* v. *William Simms, Ltd., and S. H. Gillett*, [1933] All E.R.Rep. 302; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Ministry of Health* v. *Simpson*, [1950] 2 All E.R. 1137; *Kiriri Cotton Co., Ltd.* v. *Dewani*, [1960] 1 All E.R. 177. G Referred to: *Utterson* v. *Vernon* (1792), 4 Term Rep. 570; *Colonial Bank* v. *Exchange Bank of Yarmouth* (1885), 54 L.T. 256; *R. Leslie, Ltd.* v. *Shiell*, [1914–15] All E.R.Rep. 511; *John* v. *Dodwell*, [1918] A.C. 563; *Marconi's Wireless Telegraph Co.* v. *Newman*, [1930] 2 K.B. 292; *Morgan* v. *Ashcroft*, [1937] 3 All E.R. 92; *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579; *Arab* H *Bank, Ltd.* v. *Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263; *Rousou's Trustee v. Rousou*, [1955] 3 All E.R. 486; *Metropolitan Police District Receiver* v. *Croydon Corpn.*, [1956] 2 All E.R. 785; *Grey* v. *I.R.Comrs.*, [1958] 2 All E.R. 428.

As to the action for money had and received, see 8 Halsbury's Laws (3rd Edn.) 235 et seq. For cases see 12 Digest (Repl.) 605 et seq.

Cases referred to:

I (1) *Hard's Case* (1696), 1 Salk. 23.

(2) *Smith* v. *Aiery* (1704), Holt, K.B. 329; 2 Ld. Raym. 1034; 6 Mod. Rep. 128; 3 Salk. 14, 175; 90 E.R. 1082; 25 Digest (Repl.) 420, *47*.

(3) *Beston* v. *Robinson* (1609), Cro. Jac. 218.

(4) *Astley* v. *Reynolds* (1731), 2 Stra. 915; 2 Barn.K.B. 40; 93 E.R. 939; 12 Digest (Repl.) 626, *4833*.

(5) *Slade's Case* (1602), 4 Co. Rep. 91 a; 76 E.R. 1072; sub nom. *Slade* v. *Morley*, Moore, K.B. 433; Yelv. 21; sub nom. *Morgan* v. *Slade*, Moore, K.B. 667; 24 Digest (Repl.) 670, *6589*.

(6) *Dutch* v. *Warren* (1733), 1 Stra. 406.

Action on the Case brought by the plaintiff, Moses, against the defendant, Macferlan, for money had and received to the use of the plaintiff.

The plaintiff, Moses, had endorsed to the defendant, Macferlan, four several promissory notes made to the plaintiff by one Chapman Jacob, for 30s. each, for value received, bearing date Nov. 7, 1758. This was done to enable the defendant to recover the money in his own name against Chapman Jacob. Previous to the plaintiff's endorsing these notes the defendant assured him that his endorsement should be of no prejudice to him, and there was an agreement signed by the defendant whereby he (among other things) expressly agreed that the plaintiff should not be liable for the payment of the money or any part of it, and that he should not be prejudiced, or be put to any costs, or in any way suffer, by reason of his endorsement.

The plaintiff said that notwithstanding this express condition and agreement, and contrary thereto, the defendant summoned the plaintiff Moses into the Court of Conscience [under the Small Debts Act, 1749 (repealed by County Courts Act, 1846)] upon each of the four notes, as the endorser thereof by four separate summonses. The plaintiff tendered the said indemnity to the Court of Conscience upon the first of the four causes, and offered to give evidence of it and of the agreement by way of defence. The Court of Conscience rejected this defence, and refused to receive any evidence in proof of the agreement of indemnity, thinking that they had no power to judge of it, and they gave judgment against the plaintiff, upon the mere foot of his endorsement (which he himself did not at all dispute) without hearing his witnesses about the agreement that he should not be liable. The commissioners held this agreement to be no sufficient bar to the suit in their court, and consequently decreed for the plaintiff upon the undisputed endorsement made by the plaintiff. This decree was actually pronounced, in only one of the four causes there depending, but the plaintiffs' solicitor, finding the opinion of the commissioners to be as above mentioned, paid the money into that court upon all the four notes, and it was taken out of court by the defendant by order of the commissionners.

All this matter appearing upon evidence before Lord Mansfield, C.J., at nisi prius at Guildhall, there was no doubt but that, upon the merits, the plaintiff was entitled to the money. Accordingly, a verdict was found for the plaintiff for £6 (the whole sum paid into the Court of Conscience), but subject to the opinion of the court, on the question whether the money could be recovered in the present form of action or whether it must be recovered by an action brought upon the special agreement only.

April 26, 1760, *Morton*, on behalf of the defendant, moved to set aside the verdict found for the plaintiff and to have leave to enter up judgment against the plaintiff, as for a nonsuit. To show that the action was not maintainable in its present form, he laid down a proposition that would not lie, but where debt would lie. He submitted: It lies not upon a wager nor upon a mutual assumpsit, nor against the acceptor of a bill of exchange; neither will it lie for money won at play, for it will never lie, but where the debt will lie, and can never be upon mutual promises: *Hard's Case* (1) and *Smith* v. *Aiery* (2) are expressly so in terms.

To maintain debt there must be either an express contract broken, or an implied contract broken. But there is no contract, either express or implied, that Moses would have this cause of action against Macferlan. An endorsement of a promissory note is a just cause of action, and Macferlan recovered this money of Moses, the endorser, by judgment of a court of justice. This action, "for money had and received to his use," is not the proper way of setting right the judgment of a court of justice. This agreement could not repel the action before the Court of Conscience: it was only the subject of an action to be brought upon itself. This appears from *Beston* v. *Robinson* (3), where *Beston* was in execution upon a

A statute merchant at the suit of *Robinson* and brought an audita querela and produced articles between him and Robinson as a discharge. This was held not good to discharge him of the execution, but that his remedy was to have an action of covenant upon them. So in 1 BULST. 152, note, by WILLIAMS, J., and the rest of the judges: "If the party be taken and imprisoned upon a judgment and execution where he has paid the money, he shall not have a supersedeas quia erronice, B nor no remedy, but only an audita querela, and upon promise of enlargement and not performing it, an action on the case only lieth for this, and no other remedy."

Norton, for the plaintiff: We have not misconceived our action. We were not confined to bring an action upon the special agreement, but were at liberty to bring this action for money had and received to our use to recover this money unfairly received by the defendant. I do not agree that assumpsit will not lie, C but where debt will lie. In *Astley* v. *Reynolds* (4), this principle was settled, viz., that wherever a person has wrongfully paid money, he may have it back again by this action for money had and received to his use. Yet in that very case, there was another remedy, and there was the consent of the prayer too. So likewise, for money paid on a contract which is never performed. So, on a wager on a horse-race against the stakeholder after the thing is completed and over. No D inconvenience can arise. Everything is done and finished in the present case, and no writ of error lies to the Court of Conscience, nor can its judgments be overhauled.

Cur. adv. vult.

May 19, 1760. **LORD MANSFIELD, C.J.:** delivered this unanimous judgment E of the court: There was no doubt at the trial, but that upon the merits the plaintiff was entitled to the money, and the jury accordingly found a verdict for the £6 subject to the opinion of the court upon the question whether the money might be recovered by this form of action or must be by an action upon the special agreement only.

Many objections besides that which arose at the trial have been made to the F propriety of this action in the present case. The first objection is that an action of debt would not lie here, and no assumpsit will lie where an action of debt may not be brought. Some sayings at nisi prius, reported by note takers who did not understand the force of what was said, are quoted in support of that proposition. But there is no foundation for it. It is much more plausible to say that where debt lies an action upon the case ought not to be brought. That was the G point relied upon in *Slade's Case* (5), but the rule then settled and followed ever since is that an action of assumpsit will lie in many cases where debt lies and in many where it does not lie. A main inducement originally for encouraging actions of assumpsit was to take away the wager of law, and that might give rise to loose expressions as if the action was confined to cases only where that reason held.

The second objection is that no assumpsit lies except upon an express or im- H plied contract, and here it is impossible to presume any contract to refund money which the defendant recovered by an adverse suit. Answer: If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it). This species of assumpsit (for money had and received to the plaintiff's use) lies I in numberless instances, for money the defendant has received from a third person to which he claims title in opposition to the plaintiff's right and which he had by law authority to receive from such third person.

The third objection is that where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action. Answer: It is most clear that the merits of a judgment can never be overhauled by an original suit, either at law or in equity. Till the judgment is set aside, or reversed, it is conclusive, as to the subject-matter of it to all intents and purposes. But the ground of this action is consistent with the

judgment of the Court of Conscience. It admits the commissioners did right. They decreed upon the endorsement of the notes by the plaintiff, which endorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence. It is enough for us that the commissioners adjudged that they had no cognisance of such collateral matter. We cannot correct an error in their proceedings, and ought to suppose what is done by a final jurisdiction to be right. But we think that the commissioners did right in refusing to go into such collateral matter. Otherwise, by way of defence against a promissory note for 30s. they might go into agreements and transactions of a great value, and, if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account.

The ground of this action is not that the judgment was wrong, but that for a reason which the plaintiff could not avail himself of against that judgment, the defendant ought not in justice to keep the money. At Guildhall I declared very particularly that the merits of a question determined by the commissioners where they had jurisdiction never could be brought over again, in any shape whatsoever. Money may be recovered by a right and legal judgment, and yet the iniquity of keeping that money may be manifest upon grounds which could not be used by way of defence against the judgment. Suppose an endorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the endorser who knew nothing of such payment. Suppose a man recovers upon a policy for a ship presumed to be lost which afterwards comes home, or upon the life of a man presumed to be dead who afterwards appears, or upon a representation of a risk deemed to be fair which comes out afterwards to be grossly fraudulent.

There is no occasion to go further, for the admission that unquestionably an action might be brought upon the agreement is a decisive answer to any objection from the judgment. For it is the same thing as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement that the defendant may refund the money he received, or upon the agreement itself that besides refunding the money he may pay the costs and expenses the plaintiff was put to.

This brings the whole to the question saved at nisi prius, viz., whether the plaintiff may elect to sue by this form of action for the money only or must be turned round to bring an action upon the agreement. One great benefit which arises to suitors from the nature of this action is that the plaintiff need not state the special circumstances from which he concludes that, ex æquo et bono the money received by the defendant ought to be deemed as belonging to him. He may declare generally that the money was received to his use, and make out his case at the trial. This is equally beneficial to the defendant. It is the most favourable way in which he can be sued. He can be liable no further than the money he has received, and, against that, may go into every equitable defence upon the general issue. He may claim every equitable allowance; he may prove a release without pleading it. In short, he may defend himself by everything which shows that the plaintiff ex æquo et bono, is not entitled to the whole of his demand or to any part of it. If the plaintiff elects to proceed in this favourable way, it is a bar to his bringing another action upon the agreement, though he might recover more upon the agreement than he can by this form of action. Therefore, if the question was open to be argued upon principles at large, there seems to be no reason or utility in confining the plaintiff to an action upon the special agreement only.

The point has been long settled, and there have been many precedents. I will mention to you one only which was very solemnly considered. It was *Dutch* v. *Warren* (6), which was an action on the case for money had and received to the plaintiff's use. The case was as follows. On Aug. 18, 1720, on payment of £262 10s. by the plaintiff to the defendant, the defendant agreed to transfer him five shares in the Welsh copper mines at the opening of the books, and for security of his so doing gave him this note:

A "I do hereby acknowledge to have received of Philip Dutch, £262 10s. as a consideration for the purchase of five shares, which I do hereby promise to transfer to the said Philip Dutch as soon as the books are open, being five shares in the Welsh copper mines. Witness my hand Robert Warren."

The books were opened on Aug. 22 and Dutch requested Warren to transfer to
B him the five shares. This Warren refused to do, and told Dutch "he might take his remedy." Whereupon Dutch brought the action for the consideration money paid by him. An objection was taken at the trial

"that this action upon the case for money had and received to the plaintiff's use would not lie, but that the action should have been brought for the non-performance of the contract."

C This objection was overruled by the Chief Justice; who notwithstanding left it to the consideration of the jury whether they would not make the price of the stock, as it was upon Aug. 22, when it should have been delivered, the measure of the damages. Which they did, and gave the plaintiff but £175 damages. A case being made for the opinion of the Court of Common Pleas, the action was resolved to be well brought, and that the recovery was right, being not for the whole money
D paid, but for the damage in not transferring the stock at the time, which was a loss to the plaintiff and an advantage to the defendant who was a receiver of the difference money to the plaintiff's use. The court said that the extending of those actions depends on the notion of fraud. If one man takes another's money to do a thing and refuses to do it, it is a fraud, and it is at the election of the party injured either to affirm the agreement by bringing an action for the non-performE ance of it or to disaffirm the agreement ab initio by reason of the fraud, and bring an action for money had and received to his use. The damages recovered in that case show the liberality with which this kind of action is considered, for, though the defendant received from the plaintiff £262 10s., yet the difference money only, £175 was retained by him against conscience, and, therefore, the plaintiff, ex
F æquo et bono, ought to recover no more, agreeable to the rule of the Roman law: "Quod condictio indebiti non datur ultra, quam locupletior factus est, qui accepit." If the five shares had been of much more value, yet the plaintiff could only have recovered the £262 10s. by this form of action.

The notion of fraud holds much more strongly in the present case than in that, for here it is express. The endorsement which enabled the defendant to recover,
G was got by fraud and falsehood for one purpose and abused to another. This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial and, therefore much encouraged. It lies only for money paid ex æquo et bono the defendant ought to refund. It does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law as in
H payment of a debt barred by the Statute of Limitations or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play, because in all these cases, the defendant may retain it with a safe conscience though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, express, or implied, or extortion
I or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore, we are all of us of opinion that the plaintiff might elect to wave any demand upon the foot of the indemnity, for the costs he had been put to, and bring this action to recover the £6 which the defendant got and kept from him iniquitously.

Judgment for plaintiff.

BRASS CROSBY'S CASE

[COURT OF COMMON PLEAS (De Grey, C.J., Gould, Blackstone and Nares, JJ.), Easter Term, 1771]

[Reported 3 Wils. 188; 2 Wm. Bl. 754; 19 State Tr. 1137; 95 E.R. 1005]

Habeas Corpus—Object of writ—Discharge of subject from illegal custody—Jurisdiction of court—Consideration whether committing authority acted legally—Power to discharge or bail person committed.

The writ of habeas corpus is a writ by which the subject has a right to be discharged out of custody if he has been committed and is detained contrary to law. The court determining whether the writ shall issue must consider whether the authority committing is a legal authority. If the commitment is made by those who have authority to commit, the court cannot discharge or bail the party committed.

Contempt of Court—Committal—Jurisdiction of court contemned or higher court.

All contempts are punishable either in the court contemned or in some higher court.

Parliament—House of Commons—Contempt—Exclusive jurisdiction to commit.

The House of Commons are the only judges of the privileges and contempts of the House, and adjudication in the case of contempts and punishment therefore belongs exclusively to the House with which other courts cannot interfere or control.

Notes. Applied: *R.* v. *Flower* (1799), 8 Term. Rep. 314. Considered: *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1. Applied: *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273. Considered: *Gosset* v. *Howard* (1847), 10 Q.B. 411. Referred to: *Burdett* v. *Abbot* (1812), 4 Taunt. 401; *Wensleydale Peerage* Case (1856), 8 State Tr.N.S. 479.

As to habeas corpus, see 11 HALSBURY'S LAWS (3rd Edn.) 24 et seq.; and for cases see 16 DIGEST (Repl.) 279 et seq. As to contempt of Parliament, see 28 HALSBURY'S LAWS (3rd Edn.) 464–467; and for cases see 36 DIGEST (Repl.) 397, 398.

Cases referred to:

(1) *Ashby* v. *White* (1703), 2 Ld. Raym. 938; Holt, K.B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E.R. 126; reversed (1704), 1 Bro. Parl. Cas. 62, H.L.; 36 Digest (Repl.) 393, *395*.

(2) *Sir William Thicknesse's Case*, 4 Co. Inst. 334.

(3) *Chancey's Case* (1611), 12 Co. Rep. 82; 2 Brownl. 18; 77 E.R. 1360; 16 Digest (Repl.) 300, *736*.

(4) *Bushell's Case* (1670), Vaugh. 135; Freem.K.B. 1; 1 Mod. Rep. 119; T.Jo. 13; 124 E.R. 1006; sub nom. *R.* v. *Bushell*, 6 State Tr. 999; 16 Digest (Repl.) 298, *704*.

(5) *R.* v. *Bethel* (1695), 5 Mod. Rep. 19; Holt, K.B. 145; 87 E.R. 494; sub nom. *Bethell's Case*, 1 Salk. 348; sub nom. *R.* v. *Bithell*, 1 Ld. Raym. 47; 16 Digest (Repl.) 297, *694*.

(6) *Searche's Case* (1588), 1 Leon. 70; 74 E.R. 65; 16 Digest (Repl.) 306, *832*.

(7) *Doctor Alphonso's Case* (1614), 2 Bulst. 259.

(8) *Thomas Barkham's Case* (1662), Cro. Car. 507.

(9) *Freeman's Case* (1618), Cro. Car. 579.

(10) *Apsley's Case* (1615), 1 Roll. Rep. 192, 218.

(11) *Ruswell's Case* (1615), 1 Roll. Rep. 218, 219.

(12) *Codde's Case* (1615), 1 Roll. Rep. 245; sub nom. *Hodd* v. *High Commission Court*, 3 Bulst. 146.

(13) *Lord Banbury's Case* (1706), 2 Ld. Raym. 1247; 2 Salk. 512; 92 E.R. 321; 37 Digest (Repl.) 37, *85.*

(14) *Holliday* v. *Pitt* (1734), Fortes. Rep. 342; 92 E.R. 882; sub nom. *Holiday* v. *Pit* (*Pitt*), Lee temp. Hard. 28, 37; 2 Stra. 985; sub nom. *Pitt's Case*, Fortes. Rep. 159; 7 Mod. Rep. 225; Ridg. temp. H. 91; 2 Com. 444; 36 Digest (Repl.) 393, *390.*

(15) *R.* v. *Wilkes* (1763), 2 Wils. 151; 19 State Tr. 982; 95 E.R. 737; 36 Digest (Repl.) 395, *424.*

(16) *Earl of Shaftsbury's Case* (1677), 1 Mod. Rep. 144; Freem.K.B. 453; 3 Keb. 792; 6 State Tr. 1270; 86 E.R. 792; 36 Digest (Repl.) 398, *462.*

(17) *Murray's Case* (1751), 1 Wils. 299; 95 E.R. 629; 36 Digest (Repl.) 398, *465.*

(18) *Chamber's Case* (1629), Cro. Car. 168.

(19) *Skewys* v. *Chamond* (1544), 1 Dyer, 59 b; 73 E.R. 131; sub nom. *Trewynnard's Case*, Hatsell's Cases of Privilege of Parliament, 59; 36 Digest (Repl.) 394, *405.*

Writ of Habeas Corpus.

The lieutenant of the Tower of London was commanded to have before the justices of the Court of Common Pleas the body of Brass Crosby, Lord Mayor of London, by him detained in the King's prison in the Tower, by whatever name he was called, together with the day and cause of his caption and detention, so that the justices might do that which of right and according to the law and custom of England ought to be done. On April 22, 1771, Brass Crosby, under the custody of Charles Rainsford, deputy-lieutenant of the Tower of London, was brought to the Bar of the court. The deputy-lieutenant then returned that before the coming of the said writ (to wit) on March 27 last, Brass Crosby was committed to the Tower of London by virtue of a warrant under the hand of Sir Fletcher Norton, Speaker of the House of Commons, which was in these words:

"Whereas the House of Commons have this day adjudged that Brass Crosby, Esq., Lord Mayor of London, a member of this House, having signed a warrant for the commitment of the messenger of the House, for having executed the warrant of the Speaker, issued under the order of the House, and held the said messenger to bail, is guilty of a breach of privilege of the House; and whereas the said House hath this day ordered that the said Brass Crosby, Esq., Lord Mayor of London, and a member of this House, be for his said offence committed to the Tower of London: these are, therefore, to require you to receive into your custody the body of the said Brass Crosby, Esq.; and him safely keep during the pleasure of the said House, for which this shall be your sufficient warrant. Given under my hand, the twenty-fifth day of March, 1771."

The premises being seen, and fully examined and understood by the justices, it seemed to the justices that the aforesaid cause of commitment of the said Brass Crosby to the King's prison of the Tower of London was good and sufficient in law to detain the said Brass Crosby in the prison aforesaid. Therefore, Brass Crosby was remanded to the Tower.

Serjeant Glynn (*Serjeant Jephson* with him) for the Lord Mayor: The question now before the court is whether it does not appear by the return of this writ that the Lord Mayor ought to be discharged. The return states that the imprisonment of his lordship is by virtue of a certain warrant under the hand of Sir Fletcher Norton, Speaker of the House of Commons, reciting that whereas the House had adjudged that his lordship, having signed a warrant for the commitment of a messenger of the House for having executed the warrant of the Speaker issued under the order of the House, and held that messenger to bail, is guilty of a breach of privilege of the House, and also reciting that the House had ordered that his lordship, a member of the House, should for his said offence be committed. So that it appears what that breach of privilege is.

When any person is brought to this Bar by the King's writ of habeas corpus, the judges must look into, see and consider the cause of his detention, and are bound to do that which of right and according to the law and custom of England ought to be done. Acts done by the highest authority are subject to the inquiry of the Courts of Westminster Hall whose jurisdiction extends to inquire into, control, and correct the acts not only of inferior, but also of co-ordinate and superior powers.

A breach of privilege of the House of Commons is stated, and also in what manner and by what fact their privilege was broken. Therefore, this court must determine whether the fact charged is by law a contempt or breach of privilege. When it is returned that a person was committed by any other court in Westminster Hall for a contempt generally, without specifying the fact or nature of the contempt, this court cannot inquire into the matter, but must remand the prisoner. Every court of justice of record in Westminster Hall must necessarily have absolute power to enforce obedience to their own orders or justice could not possibly be administered to the King's subjects. The House of Commons is not a court of justice of record, for it cannot administer an oath. It has a certain limited jurisdiction, and this court must judge whether it has not transgressed and gone beyond the bounds of its jurisdiction, and must pronounce upon it. If the King exercises any power which is not conformable to law, this court will remedy it. The old writ de homine replegiando did not comprehend the mandates of the King, but the habeas corpus extends to them, and to all acts of power not conformable to law. If the Court of Chancery, which is a superior court in civil causes, should exceed its jurisdiction and interfere by injunction in criminal cases, the inferior court would determine against the Court of Chancery, and would discharge anyone from imprisonment whom the court should commit for disobedience to such injunction.

This court must inquire whether the House of Commons has not exceeded its lawful jurisdiction. The Lord Mayor is charged with a contempt. The question is whether he is guilty of a contempt, that is to say, whether the fact charged upon him amounts by law to a contempt. The House of Commons makes an order for committing a printer, and that order expresses who shall take him into custody, namely, the Serjeant, or Deputy-Serjeant at Arms of the House. The printer is taken into custody by a messenger within the city of London. He complains to the Lord Mayor who examines into his complaint and proceeds judicially and according to law. After such examination, according to the best of his judgment, he is of opinion that the warrant of Sir Fletcher Norton does not justify the taking the printer into custody by a messenger of the House in the city of London. How does this interfere with the lawful jurisdiction of the House of Commons? How does it exceed the lawful jurisdiction of the Lord Mayor within the city of London? The jurisdiction of the House must be limited to some particular objects. The claim of an unlimited power in this country is absurd, and destroys itself. In the great question in *Ashby* v. *White* (1) about the Aylesbury men, we find that in a conference between the Lords and Commons it was agreed that the Commons cannot, by any vote or resolution of their own, assume or acquire any new jurisdiction or privilege.

Here is a warrant under the hand of Sir Fletcher Norton, the Speaker. Sir Fletcher Norton has no personal authority to commit whom he pleases. The Speaker, as such, has no official authority; whatever authority he can have must be merely as the instrument of the House of Commons. His act can be valid only by the order of the House, but that the warrant is made contrary to the order of the House appears to this court by the return of the habeas corpus. Consequently, the Speaker having no authority of his own, and the warrant being contrary to the order, the same is invalid. The messenger executed the warrant in the city; the Speaker had no authority to empower him to execute it in the city of London. The House of Commons has not an unlimited jurisdiction. The Lord Mayor was, therefore, obliged to examine whether the act of power exerted

A by them within the city was within their jurisdiction. The printer had been charged with printing the speeches of some members of the House, for which he was ordered to be taken into custody. The Lord Mayor thought the House of Commons had no right to order the printer to be taken into custody by their messenger in the city of London, and that the printer ought not to be committed for the act with which he was charged. There is nothing to be pretended in B favour of the proceeding of the House of Commons, but their assumed transcendant power. It would totally destroy all the benefit, and the very end of the habeas corpus, if the transcendency of any power whatever could blind the eyes of a court of justice and prevent an inquiry into its acts. Such a decision by judges sworn to administer faithfully the law would be fatal to everything that is worth preserving in our boasted constitution, and would leave the unhappy subjects of C this country in a state much worse than a state of savage nature.

The great Sir John Holt, C.J., was clearly of opinion, and held it for good law, that, if it appeared upon the face of the return of a habeas corpus that what the House of Commons called a contempt was not by law a contempt, the person committed for it must be discharged, and that the privileges of the House of Commons are part of the law of the land, and, therefore, the courts must take notice of D them incidentally. Though this was the opinion of a single judge against three others, yet it was agreed to and supported by the House of Lords, who, in those days, remembered that they were the hereditary guardians of the people. Again Sir John Holt, C.J., held that the order of the House of Commons forbidding anyone to seek or pursue a legal remedy against their orders was illegal and naught, and he boldly said so. Accordingly, he was of opinion that the persons E committed for contempt of that order ought to have been discharged, though the three other judges were of a contrary opinion and the persons were remanded to Newgate. Upon petition to the Queen a writ of error was allowed and brought, and before it was argued, Parliament was dissolved, but I will venture to say that, if it had been argued, there would have been judgment given by the House of Lords according to Sir John Holt's opinion. If the lex et consuetudo Parlia- F menti, of which we hear so much and know so little, be, indeed, a part of the law of the land, the judges are bound to take notice of it and decide upon it, as they do upon every other part of the law. It has been said that Sir John Holt was single in his opinion. Nevertheless, I may venture to say that his opinion, in the judgment of every honest and unprejudiced mind, will not be found light in the scale against that of the three other judges. He was single, but he had truth G and integrity with him as well as the strongest arguments on his side, which the conference with the Lords demonstrated—arguments which have never yet been and which cannot now be answered. The other three judges differing in opinion from him, there was a writ of error (as I said before) granted, returnable in Parliament, and if the temper of the times would have permitted it to have been proceeded in, and the Parliament had not been then dissolved, it may easily be H collected from the above referred to that it would have had from the Lords a most solemn and just decision.

DE GREY, C.J.: Brother Glynn, that writ of error you mention, was never brought before the Lords.

I *Serjeant Glynn:* It is true, my Lord, that it was never brought directly in question before them because doubts were started whether it was a writ of right, or of favour which might be refused by the particular officer. This occasioned a petition to the Queen, who, in answer to the petition, said she was come to a resolution to grant a writ of error because she was desirous to have the matter of law settled for the good of her subjects. Unhappily for us, the particular circumstances of those times prevented it, and the Parliament was dissolved.

DE GREY, C.J.: In all cases except treason and felony, I think a writ of error is grantable of right. The two Houses addressed the Queen for different purposes.

The Lords said it was time enough to decide upon the writ of error when it came before them.

Serjeant Glynn: It is for that reason I said that I collect it from other arguments, which make it very reasonable to suppose that the subject would have had satisfaction and redress from the decision of the House of Lords. The question at present is whether this court has not power to examine into the jurisdiction of the House of Commons. I submit it, with deference to the court, that you have lawful power to inquire whether the House of Commons had any jurisdiction in this case, and that their privileges are not to be supposed so transcendent and mystical as to exclude all inquiry. I deny that the act is a breach of privilege of the House of Commons. The Lord Mayor was in full possession of jurisdiction in the case; he was obliged to form an opinion upon a case within his jurisdiction. Shall his opinion be adjudged a contempt? Is it the law of the land that when different courts, having jurisdiction of the same nature, differ in their decisions, they are guilty of contempt one against the other, and may be punished for such contempt? It is no contempt in me, a private man, to have an opinion different from the greatest authorities in this kingdom. It was the Lord Mayor's opinion upon the case before him, he was bound by his oath to act pursuant to that opinion, it was his bounden duty to act accordingly; he would have been perjured if, out of respect for any persons, he had not obeyed the call of his conscience. It was no crime for him to entertain the opinion, entertaining it, he was bound to declare it, and it was his duty to act in consequence of it. The conscientious act of a magistrate within the limits of his jurisdiction can never be a contempt or punishable. Unless he acts wrongly from corrupt motives, he cannot be punished. Suppose the Lord Mayor did not act from his opinion, but from some corrupt motive, it is not the House of Commons, but a jury, that must judge of it. The duty of a magistrate differs widely from that of an officer. From the latter a full and ready obedience is required to be paid to the orders of the court whose officer and minister he is, and such orders, rightly pursued and executed by him, are his sufficient justification, but the magistrate is bound by his oath and has an opinion and judgment of his own which he must follow, and he is answerable to the law, and cannot be justified for the breach of his oath and the law by any order or resolution of the greatest authority. Your Lordships are now called upon to say whether the Lord Mayor of London, in a case where he had indisputable jurisdiction, acting by his opinion and according to his oath, is guilty of a contempt of the House of Commons, and can by law be imprisoned.

Serjeant Jephson: The question is whether sufficient cause appears to the court upon the return of this writ, to imprison the Lord Mayor. If no legal cause appears for detaining him in custody, he must be discharged.

Consider the nature, the return, and the consequence of the writ of habeas corpus. It is a prerogative writ of right to inquire into the cause of the imprisonment of any of the King's subjects. If a legal cause of detention does not appear upon the return of the writ, the subject must be discharged and set at liberty. Therefore, if a legal cause does not appear upon the return of this writ, the Lord Mayor must be discharged out of custody.

It appears from *Sir William Thicknesse's Case* (2), and from *Bushell's Case* (4), that the cause of imprisonment ought to be as specifically returned to those who judge upon the writ of habeas corpus as it did to those who first committed the party. Where the commitment is not to the legal and immediate officer, it is naught: *Bethell's Case* (5). Again, see *Searche's Case* (6), where the Queen had taken a person into her protection, who, notwithstanding, was arrested, and the person arresting committed and on a habeas corpus was discharged: see *Doctor Alphonso's Case* (7), also where the return was bad, no cause being therein showed; also, *Thomas Barkham's Case* (8); *Freeman's Case* (9); *Apsley's Case* (10); *Ruswell's Case* (11), and *Codde's Case* (12). The determination in all the cases the same: if the legal charge is not returned, the person must be discharged; the court

must judge of the cause of commitment returned; if not, why should the writ command the return of the cause?; the cause is returned that the court may judge whether the person is entitled to his liberty or not. It is no objection in this case to say that, the House of Commons having a power to commit, therefore, this court must not judge of the cause of commitment returned, for this would prove too much because it would go to every other court having jurisdiction to commit. Suppose the Court of King's Bench, which is equal and perhaps superior in some respects to this court, should commit a person and the person committed should be brought here by habeas corpus, this court would certainly take notice and inquire into the cause returned, and, if this court thought it not a sufficient cause, would discharge the person. Otherwise how would the end of bringing the writ of habeas corpus be answered?

It is no objection in this case to say that the court cannot examine the cause as stated in the return because the court would then determine upon the privileges of the House of Commons. The court must, and does frequently, determine upon the privileges of Parliament when they come incidentally before them: see *Lord Banbury's Case* (13); *Holiday* v. *Pitt* (14) (2 Stra. 987, 8). This court made no sort of hesitation to determine in *R.* v. *Wilkes* (15) upon the privilege of Parliament. Why then should they not enter into this question, touching the privilege of Parliament? In *Earl of Shaftsbury's Case* (16) and *Murray's Case* (17), the returns were general for contempts of the House without stating the particular facts, but the facts of the supposed contempt in this case appear, which we contend cannot by any legal construction amount to a contempt, and, therefore, that the Lord Mayor must be discharged. The House of Commons having determined it to be a contempt does not alter the case. A fact does not become a contempt by being recited to be such. The court must consider whether the warrant for the Lord Mayor's commitment is the warrant of the Speaker as Speaker of the House of Commons, as Sir Fletcher Norton may act in a double capacity: (whereupon a loud laugh).

DE GREY, C.J.: Sir Fletcher Norton signs himself Speaker.

Serjeant Jephson: His signing himself Speaker will not help the warrant, if the cause is not sufficient, and the court may rather suppose the mistake committed by Sir Fletcher Norton, in his private capacity, than by the House of Commons. Suppose some future Speaker of some future House of Commons should recite in his warrant that the House of Commons had adjudged it a breach of privilege, and a contempt to sue out a statute of bankrupt against one of their members, which by Act of Parliament anyone is permitted to do, and should in consequence, commit a person for that legal act. If the person was brought by writ of habeas corpus before this court, would not the court take cognisance of the commitment? Would they not determine it no breach of privilege? Are the Acts of Parliament of less force than such a recital in a Speaker's warrant? Suppose a person is committed by a similar warrant for proceeding according to Act of Parliament against a member of the House in an action of debt. Shall he have no remedy from the law which led him into the supposed transgression? Suppose a justice of peace should commit a member of the House of Commons for treason, felony, or breach of the peace, and the Speaker's warrant should recite it to be a contempt, will this court say that they will take no cognisance of such a commitment by the House of Commons? Suppose all the officers of this court should be recited in the Speaker's warrant to be in contempt for executing the process of this court, will this court give no remedy? Must this and every other court of justice be annihilated whenever the Speaker's warrant declares all its officers in contempt? How is it possible to distinguish the present case from those I have mentioned if you must not examine the cause returned, but say it is sufficient if a contempt is charged? SERJEANT HAWKINS, in his [PLEAS OF THE CROWN], vol. 2, 110, gives us clearly enough his thoughts upon this subject. He says there (among other things), that if a subject should be committed by either the Houses of Parliament,

it cannot be imagined that the law, which favours nothing more than the liberty of the subject should give us a remedy against commitments by the King himself, appearing to be illegal, and give us no manner of redress against a commitment by our fellow-subjects, equally appearing to be unwarranted.

The question, therefore, is whether on the return there appears sufficient cause of detention. Three causes are mentioned, and all urged as breaches of privilege. (i) For discharging a printer; (ii) for having signed a warrant for the commitment of the messenger, and (iii) for holding him to bail. To make the Lord Mayor guilty of the first supposed contempt, it ought surely to appear to the court that Miller, the printer, was in the legal custody of the messenger. Miller never was in the legal custody of the messenger, for the warrant to take up Miller was directed to the Serjeant-at-Arms of the House of Commons or his deputy, and not to the messenger. So Miller was in the illegal custody of the messenger, and, therefore, the Lord Mayor did right. Miller was ordered into the custody of the Serjeant-at-Arms or his deputy, but the contrary appears upon the return in the recital of the order, for that intimates that he was taken into custody by the messenger by virtue of the warrant of the Speaker of the House issued under the order of the House. Miller was taken into custody by the messenger in the city of London, neither the Serjeant-at-Arms or his deputy being present. The messenger was guilty of false imprisonment, having no warrant directed to himself, nor acting in aid and assistance to the Serjeant-at-Arms, or his deputy to whom the warrant to take up Miller was directed, for neither of them was present, so that if an action of false imprisonment were to be brought against the messenger, he could not justify what he did, and, if he cannot justify in an action of false imprisonment, how could he justify before the Lord Mayor? As for the other supposed contempt of signing a warrant against the messenger and holding him to bail, the messenger had been guilty of an assault and false imprisonment in taking Miller into custody in the city of London without any legal warrant or authority. What contempt is it to sign a warrant against the messenger?

GOULD, J.: The messenger was committed for having executed a warrant of the Speaker.

Serjeant Jephson: That does not appear. Your Lordships cannot know that, for the return only says, for signing a warrant against the messenger. For these reasons, I pray the Lord Mayor may be discharged out of the custody of the lieutenant of the Tower of London.

DE GREY, C.J.—If either myself or any of my brothers on the Bench had any doubt in this case we should certainly have taken time to consider before we had given our opinions, but the case seems so very clear to us all that we have no reason for delay.

The writ by which the Lord Mayor is now brought before us is a habeas corpus at common law, for it is not signed per statutum [i.e., according to the provisions of s. 2 of the Habeas Corpus Act, 1679: 6 HALSBURY'S STATUTES (2nd Edn.) 83]. It is called a prerogative writ for the King, or a remedial writ; and this writ was properly advised by the counsel for his lordship because all the judges (including SIR JOHN HOLT, C.J.) agreed that such a writ as the present case required is not within the statute. This is a writ by which the subject has a right of remedy to be discharged out of custody if he has been committed and is detained contrary to law. Therefore, the court must consider whether the authority committing is a legal authority. If the commitment is made by those who have authority to commit, this court cannot discharge or bail the party committed, nor can this court admit to bail one charged or committed in execution. Whether the authority committing the Lord Mayor is a legal authority or not must be adjudged by the return of the writ now before the court. The return states the commitment to be by the House of Commons for a breach of privilege which is also stated in the return, and this breach of privilege or contempt is, as counsel has truly described

A it, threefold—discharging a printer in custody of a messenger by order of the House of Commons, and signing a warrant for the commitment of the messenger and holding him to bail, that is, treating a messenger of the House of Commons as acting criminally in the execution of the orders of that House.

In order to see whether that House has authority to commit, see 4 Co. Inst. 23. Such an assembly must certainly have such authority, and it is legal because B necessary. Sir Edward Coke says they have a judicial power. Each member has a judicial seat in the House. He speaks of matters of judicature of the House of Commons: 4 Co. Inst. 23. The House of Commons, without doubt, have power to commit persons examined at their Bar touching elections when they prevaricate or speak falsely, so they have for breaches of privilege, so they have in other cases. Thomas Long gave the mayor of Westbury £4 to be elected a C burgess; he was elected, and the mayor was fined and imprisoned, and Long removed. Arthur Hall, a member, was sent to the Tower for publishing the conferences of the House: 4 Co. Inst. 23. This power of committing must be inherent in the House of Commons, from the very nature of its institution, and, therefore, is part of the law of the land. They certainly always could commit in many cases. In matters of elections they can commit sheriffs, mayors, officers, D witnesses, etc., and it is now agreed that they can commit generally for all contempts. All contempts are either punishable in the court contemned, or in some higher court. Parliament has no superior court; therefore, the contempts against either House can only be punished by themselves. The Privilege of Parliament Act, 1603, s. 3, sufficiently proves that they have power to punish. It is in these words:

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> "Provided always, that this Act, or anything therein contained, shall not extend to the diminishing of any punishment to be hereafter by censure in Parliament inflicted upon any person which hereafter shall make, or procure to be made, any such arrest as is aforesaid."

So that it is most clear that the legislature have recognised this power of the F House of Commons. In *Ashby* v. *White* (1), counsel admitted, Sir John Holt, C.J., owned, and the House of Lords acknowledged, that the House of Commons had power to commit for contempt and breach of privilege. Indeed, it seems, they must have power to commit for any crime, because they have power to impeach for any crime. When the House of Commons adjudge anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their G commitment in consequence, is execution, and no court can discharge or bail a person that is in execution by the judgment of any other court. The House of Commons, therefore, having an authority to commit and that commitment being an execution, the question is: What can this court do? It can do nothing when a person is in execution by the judgment of a court having a competent jurisdiction; in such a case, this court is not a court of appeal.

H It is objected (i) that the House of Commons are mistaken for they have not this power, this authority; (ii) that, supposing they have, yet in this case they have not used it rightly and properly; and (iii) that the execution of their orders was irregular. In order to judge I will consider the practice of the courts in common and ordinary cases. I do not find any case where the courts have taken cognisance of such execution or of commitments of this kind. There is no prece- I dent of Westminster Hall interfering in such a case. In *Sir John Paston's Case*, cited in 13 Co. Rep. 64 from the Year Book, where it is held that every court shall determine of the privilege of that court. Besides, the rule is that the court of remedy must judge by the same as the court which commits. This court cannot take cognisance of a commitment by the House of Commons because it cannot judge by the same law, for the law by which the Commons judge of their privileges is unknown to us. If the Court of Common Pleas should commit a person for a contempt, the Court of King's Bench would not inquire into the legality or particular cause of commitment if a contempt was returned; yet in some cases the

Court of King's Bench is a court of inquiry, but in this case is only co-ordinate with this court.

In *Chamber's Case* (18), Chambers was brought up by habeas corpus out of the Fleet; and it was returned that he was committed by virtue of a decree in the Star Chamber by reason of certain words he used at the Council Table, for which he was censured to be committed to the Fleet till he made his submission at the Council Table and paid a fine of £2,000. At the Bar he prayed to be delivered because the sentence was not warranted by any law or statute, for the Star Chamber Act, 1487, which is the foundation of the Court of Star Chamber, does not give them any authority to punish for words only. But all the court informed him that the Court of Star Chamber was not erected by the statute of 1487, but was a court many years before, and one of the most high and honourable courts of justice, and to deliver one who was committed by the decree of one of the courts of justice was not the usage of this court. Therefore, he was remanded. The Courts of King's Bench or Common Pleas never discharged any person committed for contempt in not answering in the Court of Chancery if the return was for a contempt; if the Admiralty Court commits for a contempt, or one be taken up and committed by an excommunicato capiendo, this court never discharges the persons committed. Formerly, when many abuses were committed and the people could not obtain a remedy the subject was not contented with the ancient habeas corpus, but did not complain of the courts for refusing them what they could not by law grant them. Instead of that they sought redress by petition to the Throne. In the time of WILMOT, C.J., a person was brought by habeas corpus before this court who had been committed by the Chancery Court of Durham, that court being competent, and having jurisdiction. The man was not discharged, but recommitted.

How then can we do anything in the present case when the law by which the Lord Mayor is committed is different from the law by which he seeks to be relieved? He is committed by the law of Parliament, and yet he would have redress from the common law. The law of Parliament is only known to Parliament by experience in the House. SIR EDWARD COKE says that every man looks for it, but few can find it. The House of Commons alone know how to act within their own limits. We are not a court of appeal; we do not know certainly the jurisdiction of the House of Commons; we cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges. We cannot judge of the contempt thereof, we cannot judge of the punishment therefor.

I wish we had some code of the law of Parliament, but till we have such a code it is impossible we should be able to judge of it. Perhaps a contempt in the House of Commons, in the Chancery, in this court, and in the court of Durham, may be very different. Therefore, we cannot judge of it, but every court must be the sole judge of its own contempts. Besides, as the court cannot go out of the return of this writ, how can we inquire into the truth of the fact as to the nature of the contempt? We have no means of trying whether the Lord Mayor did right or wrong. This court cannot summon a jury to try the matter; we cannot examine into the fact; here are no parties in litigation before the court; we cannot call in anybody; we cannot hear any witnesses, or depositions of witnesses; we cannot issue any process; we are even now hearing ex parte and without any counsel on the contrary side. Again, if we could determine upon the contempts of any other court, so might the other courts of Westminster Hall, and what confusion would then ensue, none of us knowing the law by which persons are committed by the House of Commons. If three persons were committed for the same breach of privilege, and applied severally to different courts, one court, perhaps, would bail, another court discharge, a third recommit.

Two objections have been made which I own have great weight because they hold forth, if pursued to all possible cases, consequences of most important mischief. First, it is said that, if the rights and privileges of Parliament are legal rights, for that very reason the court must take notice of them, because they are

A legal. Secondly, if the law of Parliament is part of the law of the land, the judges must take cognisance of one part of the law of the land as well as of the other. But these objections will not prevail. There are two sorts of privileges which ought never to be confounded—personal privilege, and the privilege belonging to the whole collective body of that assembly. For instance, it is the privilege of every individual member not to be arrested. If he was arrested, before the Privi-
B lege of Parliament Act, 1700 [repealed Statute Law Revision Act, 1867], the method in Westminster Hall was to discharge him by writ of privilege under the Great Seal which was in the nature of a supersedeas to the proceedings, and as soon as it came into the Court of King's Bench and was pleaded there, then it became a record, and the pleading concluded, si curia domini Regis placitum prædictum cognoscere velit aut debeat. The statute of 1700 has altered this, and
C there is now no occasion to plead the privilege of a member of Parliament: *Holiday* v. *Pitt* (14) (2 Stra. 985). There is a great difference between matters of privilege coming incidentally before the court and being the point itself directly before the court. In the first case the court will take notice of them because it is necessary in order to prevent a failure of justice, as in *Lord Banbury's Case* (13), where the Court of King's Bench determined against the determination of the
D House of Lords, but in that case they considered the legality and validity of the letters patent without regarding the other right of a seat in the House of Lords with which the court did not concern themselves. Counsel at the Bar have not cited one case where any court of Westminster Hall ever determined a matter of privilege which did not come incidentally before them. If a question is to be determined in this court touching a descent whereby property is to be determined
E and which depends upon legitimacy, i.e., whether the father and mother were married lawfully, this court must determine by the bishop's certificate, but in some cases, where legitimacy of marriage does not come in question, but cohabitation only for a great length of time, which is evidence of a marriage, comes in question, this court will determine according to the verdict of a jury although the courts of Westminster Hall go by a different rule from the spiritual courts.
F But the present case differs much from those which the court will determine, because it does not come incidentally before us, but is brought before us directly, and is the whole point in question, and to determine it we must supersede the judgment and determination of the House of Commons and a commitment in execution of that judgment.

G Another objection has been made, which likewise holds out to us, if pursued in all its possible cases, some dreadful consequences, and that is the abuses which may be made by jurisdictions from which there is no appeal and for which abuses there is no remedy. But this is unavoidable, and it is better to leave some courts to the obligation of their oaths. In the case of a commitment by this court or the King's Bench there is no appeal. Suppose the Court of King's Bench sets an
H excessive fine upon a man for a misdemeanour, there is no remedy, no appeal to any other court. We must depend upon the discretion of some courts. A man not long ago was sentenced to stand in the pillory by this Court of Common Pleas for a contempt. Some may think this very hard to be done without a trial by jury, but it is necessary. Suppose the courts should abuse their jurisdiction, there can be no remedy for this. It would be a public grievance, and redress
I must be sought from the legislature. The laws can never be a prohibition to the Houses of Parliament, because, by law, there is nothing superior to them. Suppose they also, as well as the courts of law, should abuse the powers which the constitution has given them, there is no redress; it would be a public grievance. The constitution has provided checks to prevent its happening. It must be left at large; it was wise to leave it at large: some persons, some courts, must be trusted with discretionary powers; and though it is possible, it is in the highest degree improbable, that such abuses should ever happen, and the very supposal is answered by Serjeant Hawkins in the placed cited at the Bar. As for the case of the Chancery committing for crimes, that is a different thing, because the

Chancery has no criminal jurisdiction, but if that court commits for contempt the persons committed will not be discharged by any other court. Many authorities may be drawn from the reign of Charles, but those were in times of contest. At present, when the House of Commons commits for contempt it is very necessary to state what is the particular breach of privilege, but it would be a sufficient return to state the breach of privilege generally.

This doctrine is fortified by the opinion of all the judges in *Earl of Shaftsbury's Case* (16), and I never heard this decision complained of till 1704. Though they were times of heat, the judges could have no motive in their decision, but a regard to the laws; the Houses disputed about jurisdiction, but the judges were not concerned in the dispute. As for the present case, I am perfectly satisfied that, if Sir John Holt, C.J., himself were to have determined it, the Lord Mayor would be remanded. In *Murray's Case* (17) the judges could not hesitate concerning the contempt by a man who refused to receive his sentence in a proper posture. All the judges agreed that he must be remanded because he was committed by a court having competent jurisdiction. Courts of justice have no cognisance of the actions of the Houses of Parliament, because they belong ad aliud examen. I have the most perfect satisfaction in my own mind in that determination. Sir Martin Wright, J., who felt a generous and distinguished warmth for the liberty of the subject; Denison, J., who was so free from connections and ambition of every kind; and Foster, J., who may be truly called the magna carta of liberty of persons as well as fortunes—all these revered judges concurred in this point. I am, therefore, clearly and with full satisfaction of opinion that the Lord Mayor must be remanded.

GOULD, J.—I entirely concur in opinion with my Lord Chief Justice that this court has no cognisance of contempt or breach of privilege of the House of Commons. They are the only judges of their own privileges, and that they may be properly called judges, appears in 4 Co. Inst. 47, where Sir Edward Coke says that an alien cannot be elected of the Parliament, because such person can hold no court of judicature. Much stress has been laid upon an objection that the warrant of the Speaker is not conformable to the order of the House, and yet no such thing appears upon the return as has been pretended. The order says that the Lord Mayor shall be taken into the custody of the Serjeant or his deputy; it does not say by the Serjeant or his deputy. This court cannot know the nature and power of the proceedings of the House of Commons: it is founded on a different law; the lex et consuetudo Parliamenti is known to Parliament men only. *Trewynnard's Case* (19). When matters of privilege come incidentally before the court, it is obliged to determine them to prevent a failure of justice. It is true this court did, in the instance alluded to by counsel at the Bar [*R.* v. *Wilkes* (15)], determine upon the privileges of Parliament in the case of a libel, but then that privilege was promulgated and known. It existed in records and law books, and was allowed by Parliament itself, but even in that case we now know that we were mistaken for the House of Commons have since determined that privilege does not extend to matters of libel. The cases produced respecting the High Commission Court, etc., are not to the present purpose, because those courts had not a legal authority. The resolution of the House of Commons is an adjudication, and every court must judge of its own contempts.

BLACKSTONE, J.—I concur in opinion that we cannot discharge the Lord Mayor. The present case is of great importance, because the liberty of the subject is materially concerned. The House of Commons is a supreme court, and they are judges of their own privileges and contempts, more especially with respect to their own members. Here is a member committed in execution by the judgment of his own House. All courts, by which I mean to include the two Houses of Parliament, and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempts and the punishment thereof in any manner belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow, if courts could, by writs of habeas

corpus examine and determine the contempts of others. This power to commit results from the first principles of justice, for if they have power to decide, they ought to have power to punish. No other court shall scan the judgment of a superior court, or the principal seat of justice. As I said before, it would occasion the utmost confusion, if every court of Westminster Hall should have power to examine the commitments of the other courts of Westminster Hall for contempts. So the judgment and commitment of each respective court as to contempts must be final and without control. It is a confidence that may with perfect safety and security be reposed in the judges and the Houses of Parliament. The legislature since the Revolution have created many new contempts. The objections which are brought of abusive consequences prove too much, because they are applicable to all courts of dernier resort. Ab abusu al usum non valent consequentia, is a maxim of law as well as of logic. General convenience must always outweigh partial inconvenience, even supposing (which, in my conscience, I am far from supposing) that in the present case the House has abused its power. I know, and am sure, that the House of Commons are both able and well inclined to do justice. How preposterous is the present murmur and complaint. The House of Commons have this power only in common with all the courts of Westminster Hall: and if any persons may be safely trusted with this power, they must surely be the Commons who are chosen by the people, for their privileges and powers are the privileges and powers of the people. There is a great fallacy in *Serjeant Glynn*'s whole argument when he makes the question to be whether the House have acted according to their rights or not. Can any good man think of involving the judges in a contest with either House of Parliament or with one another? Yet this manner of putting the question would produce such a contest. The House of Commons is the only judge of its own proceedings. SIR JOHN HOLT, C.J., differed from the other judges in this point, but we must be governed by the eleven and not by the single one. It is a right inherent in all the supreme courts; the House of Commons have always exercised it. Little nice objections of particular words and forms and ceremonies of execution are not to be regarded in the actions of the House of Commons. It is our duty to presume that the Orders of that House, and their execution are according to law. The habeas corpus in *Murray's Case* (17) was at common law. I concur entirely with my Lord Chief Justice.

NARES, J.—I shall ever entertain a most anxious concern for whatever regards the liberty of the subject. I have not the vanity to think I can add anything to the weight of the arguments used by my Lord Chief Justice and my brothers. I have attended with the utmost industry to every case and argument that has been produced, and most heartily and readily concur with my Lord Chief Justice and my brothers.

The Lord Mayor was remanded to the Tower.

DUKE OF HAMILTON *v.* LORD MOHUN

[LORD CHANCELLOR'S COURT (Lord Cowper, L.C.), Easter Term, 1710]

[Reported 1 P.Wms. 118; 1 Salk. 158; 2 Vern. 652; 1 Eq. Cas. Abr. 90, pl. 6; 24 E.R. 319]

Contract—Illegality—Public policy—Marriage—Brokage—Release of wife's guardian from rendering accounts.

A covenant made by a husband before marriage to release his wife's guardian from his obligation to render accounts is not binding, such an agreement being in the same category as a marriage brokage contract.

Notes. Referred to: *Law* v. *Law* (1735), Cas. temp. Talb. 140; *Wright* v. *Proud* (1806), 13 Ves. 136; *Hermann* v. *Charlesworth* (1905), 74 L.J.K.B. 620.

As to agreements contrary to public policy, see 8 HALSBURY'S LAWS (3rd Edn.) 130 et seq.; and for cases see 7 DIGEST (Repl.) 175 et seq.

Cases referred to:

(1) *Countess of Radnor* v. *Vandebendy* (1697), Show. Parl. Cas. 69; 1 E.R. 48; sub nom. *Lady Radnor* v. *Rotherham* (*Rotheram*), Freem. Ch. 211; Prec. Ch. 65, H.L.; 47 Digest (Repl.) 184, *1531*.

(2) *Kemp* v. *Coleman* (1707), 1 Salk. 156.

(3) *Goldsmith* v. *Bruning* (1700), 1 Eq. Cas. Abr. 89, pl. 4; 21 E.R. 901; sub nom. *Smith* v. *Bruning*, 2 Vern. 392; 7 Digest (Repl.) 175, *77*.

(4) *Keat* v. *Allen* (1707), 2 Vern. 588; 1 Eq. Cas. Abr. 90, pl. 5; 23 E.R. 983; sub nom. *Anon.* (1708), Prec. Ch. 267; 2 Eq. Cas. Abr. 187, pl. 1; 7 Digest (Repl.) 175, *78*.

(5) *Butler* v. *Chancy* (prior to 1699), cited in Eq. Cas. Abr. 88, pl. 3.

(6) *Osborne* v. *Chapman* (1683), 2 Cas. in Ch. 157; 22 E.R. 893; 28 Digest (Repl.) 540, *546*.

Bill to be relieved against marriage articles.

The Duke of Hamilton married the daughter and heiress of Lord Gerrard. The articles of marriage which were agreed on with great deliberation provided, inter alia, that the Duke should, within two days after marriage, for the peace of the family, release to Lady Gerrard (the mother and guardian of the young lady) all acounts of the mesne profits of the estate, it being insisted on by the mother and admitted by the duke at that time, that the charge of the education of the young lady and the interest paid by the mother on a mortgage of a good part of the estate, which had been discharged by her as guardian, would come to as much as the profits of the estate.

It was also admitted by the parties that the mother was entitled to her dower of a third of the estate which was in mortgage for a term of years, but the mortgagee had never entered on the premises. In the marriage articles the duke bound himself in the penalty of £10,000 to the mother for the giving this release within the said space of two days after the marriage.

The duke was sued on these articles at law and brought his bill in equity to be relieved against them, and for an account of the mesne profits. The defendant was executor to Lady Gerrard. It was argued for the defendant, first, that here was no surprise or misrepresentation but a very solemn agreement, and which tended to the peace of the family. Secondly, that if the duke had, after the marriage, given such release, equity would not have relieved against it; and for the same reason it ought not to relieve against a covenant for the giving such release. Thirdly, that if agreements (although on good consideration and deliberation) could not be made, it might turn to the disadvantage of infants for then no guardian could be secure from suits which would end in discouraging all treaties of marriage on behalf of those that were in wardship to them. It was objected for the plaintiff, as to the point of dower, that this was a gift in law not in equity,

A and that there could be no dower of a trust, nor consequently of a trust term; and supposing a judgment in dower had been recovered, yet there must have been a cesset executio during the term; and it being so at law, æquitas sequitur legem. *Countess of Radnor* v. *Vandebendy* (1) was cited.

LORD COWPER, L.C., said that admitting there was no surprise in the gaining B of this covenant from the Duke of Hamilton (as there seemed to be none) it being agreed on after great deliberation and advice of counsel on both sides, and admitting that there had been no concealment of the matters to be accounted for (though in this case the particulars of what was to be released did not so fully appear as they might and ought to have done), yet this covenant to make such release ought to be set aside, as it seemed to be extorted from the duke by one who C had a power over the young lady courted by him, as her parent, which ought not to have been made use of in this manner. It was as if the mother should say, you shall not have my daughter unless you will release all accounts.

This agreement was within the same reason as a marriage brokage agreement, which had been so often condemned in equity: *Kemp* v. *Coleman* (2); *Smith* v. *Bruning* (3); *Keat* v. *Allen* (4). A bond to give money if such a marriage could be D obtained was ill, and by the same reason, a bond to forgive a sum of money must be ill also. The case of a mother or guardian insisting on gain for consenting to a marriage must be a much more frequent mischief and, in all probability, oftener happen than an agreement of this nature with a third person. It was most natural in this case to treat with the guardian; to tolerate such an agreement would be paving a way to guardians to sell infants under their wardship; and the greater E the fortune was, the greater would be the temptation to treat in this manner with the guardian in order to such a marriage. Such a release might be good had it been given by the husband after marriage. Indeed, it would be, because, if such release were given after marriage, it must be presumed to be given freely, whereas this covenant could not be supposed to be made freely, because the duke might reasonably apprehend that he must have lost the young lady if he had refused F the covenant.

This was within the common case of equity's relieving an heir against any private agreement with his father on the marriage of the heir. For example, where the father covenants to settle an estate on the marriage and the heir privately agrees to repay so much out of it to the father (see *Butler* v. *Chancy* (5)); the heir is in awe of his parent in such case and not supposed to act freely. For that reason G a court of equity relieves against all such private agreements. The LORD CHANCELLOR, therefore, relieved against this covenant to give a release.

[On the second point] There ought to be an allowance of the third part of the profits for dower to the mother, or her representative. In *Countess of Radnor* v. *Vandebendy* (1) there was a purchaser of the lands against whom the dowress sought relief in equity as to her dower. Here, however, when the mortgagee never H insisted to enter for his mortgage, it would be hard that the heir should insist on it to prevent the dower. Besides, she (had there been occasion) could have redeemed the mortgage. As to the want of a formal assignment of dower, that is nothing in equity for still the right in conscience is the same, and if the heir brings a bill against the mother for an account of profits, it is most just that a court of equity should, in the account, allow a third of the profits for the right I of dower.

Osborne v. *Chapman* (6) was cited as a stronger case.

Order accordingly.

A

ATTORNEY-GENERAL *v.* LOCK

[Lord Chancellor's Court (Lord Hardwicke, L.C.), July 26, 1744]

[Reported 3 Atk. 164; 26 E.R. 897]

Charity—Visitatorial power—Governors as visitors—Accountability to court quoad estates of charity.

B

If governors are visitors also, they are accountable to the court quoad the estates of the charity.

Statute—Construction—"May or shall"—Imperative construction.

"Shall and may" in general Acts of Parliament, or in private constitutions, are to be construed imperatively.

C

Notes. The taking of legal charity proceedings is now provided by s. 28 of the Charities Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 159).

As to the nature of the charity visitatorial power and when the court will interfere, see 4 Halsbury's Laws (3rd Edn.) 408 et seq.; and for cases see 8 Digest (Repl.) 487. As to the interpretation of charter, see 9 Halsbury's Laws (3rd Edn.) 25, 26; and for cases see 13 Digest (Repl.) 205, 206. As to enabling statutes, whether exercise of statutory powers obligatory or permissive, see 36 Halsbury's Laws (3rd Edn.) 433; and for cases see 44 Digest (Repl.) 312.

D

Cases referred to:

(1) *Sutton Colefield Case* (1635), Duke, 68; 8 Digest (Repl.) 470, *1720*.

(2) *A.-G.* v. *Price* (1744), 3 Atk. 108; 26 E.R. 866, L.C.; 8 Digest (Repl.) 505, *2259*.

E

Petition by the Attorney-General at the relation of Gray and others on behalf of the charity against Sir John Lock and others, trustees of Magdalen College on Blackheath, under the will of Sir John Morden. The court was asked to examine the reasons for the removal of the relators as pensioners of the college and to restore them to their former positions in the college.

F

LORD HARDWICKE, L.C.—At present the question is whether I should be warranted on such an application as this to take a previous step to restore these persons to their places in the college. It is incumbent upon this court to support the charity. It is likewise incumbent on them to maintain and guard the power of those who have that authority from the donor. For it would be of bad consequence to the charity, if the authority of persons entrusted with the management of the charity was upon every instance to be enervated and broken into.

G

If there were to be the same niceties observed upon the amotion of some of the pensioners of a hospital, as if they had turned out a person from a freehold, no man of fortune or abilities would undertake such a trust. Sir John Morden has not left the power of visiting to his heir, but has made a perfect constitution of this charity. Now this is very material to the first and great question, the authority of the trustees. They and the survivors are to have a power to place and displace the chaplain, treasurer, and other officers and merchants, etc., at their will and pleasure. They have a power to make bye-laws and rules for the regulating of the charity, and for the government and conduct of the house, which is a very general power. Then he directs the said governors and visitors shall and may visit the said college once a year, or oftener if they think fit. At which time they are to inspect the treasurer's accounts, and also to examine into the behaviour of the chaplain, etc., and if they find they have acted dishonestly and improperly, to displace them, and put other persons in their room. Likewise, if they find any merchant immoral, guilty of drunkenness, etc., they shall and may remove them.

H

I

The first objection is that this is within the *Sutton Colefield Case* (1). I agree that where there are governors who are visitors likewise, so far as relates to the estates of this charity, they are subject and accountable to this court. There are

two sorts of authorities here. One as to the management of the estate and revenue; the other as to the management and government of the house. In the latter they are absolute, and not controllable by this court; and is like *A.-G.* v. *Price* (2) which came before me on July 13, 1744, where I was of opinion that the power of visiting was absolute in the Warden of All Souls, and this court had no right to interpose.

As to the question whether they have an arbitrary power to remove at pleasure, I will give no absolute opinion, but I am inclined to think they have such a power of removing, without hearing or giving any reason for so doing. My reasons are these. By the constitution of this charity they have a power of removing the chaplain, treasurer, and other officers, at their will and pleasure. If it had rested there, there is no doubt but they might have done it; but it is insisted by the Attorney-General that there is another clause restraining them. But I think the latter clause is not a restraining clause, or gives them less power, but only lays an injunction or obligation upon them to remove for such general offences, and leaves them in every instance besides to act at their discretion. But afterwards, in their general local visitation, they are to call the treasurer to account. This they might have done by virtue of their being governors, and, therefore, it is an injunction upon them to inspect the treasurer's accounts, etc. Are they to remove the officers and servants for an offence that must be supported in a court of justice, with the same legal nicety as in the case of a freehold? Is the chaplain or treasurer an officer for life? They would, if so, be equally restrained from removing them as the merchants themselves. As to the merchants, if guilty of drunkenness or any debauchery, then they shall and may by writing under hand and seal turn them out. The words "shall and may" in general Acts of Parliament, or in private constitutions, are to be construed imperatively, they must remove them. Upon the whole of this point I am of opinion that there is a general power of amotion, but, as I said before, the founder has laid an obligation upon them to turn out for the majora crimina, if I may so call them.

Next as to the relators; and first, as to Mr. Gray. It has been said that this is only a decent application for an account of the charity. But I think the letter he sent to the governor is very gross, and almost a libel, for saying that they have £15,000 odd in their hands, certainly carries a reflection with it. The other two relators admit themselves to be privy to the letter. The great difficulty with me is the danger of making a precedent of restoring a mere pensioner of a hospital, on the application of the pensioner himself. Consider what number of great hospitals there are in this kingdom, and how bad the consequence would be for me to examine too nicely into these amotions, as if the freehold of a person was in question. The governors of these hospitals every day turn out, and put in, and there would be no end of such inquiries, and would be a means of overturning these charities absolutely. This is, as has been very justly said, to make a decree before the cause is heard upon motion, and even before an answer is put in. Suppose it was an information against a schoolmaster, would the court turn him out or would they restore him upon a motion, without hearing the cause? If you will compare it to cases at law, compare it throughout. Suppose a mandamus from the Court of King's Bench to restore a person to an office, would the court in a summary way do it without examining regularly into the merits of the case? Certainly not. It would be a much less prejudice to the foundation if one of these pensioners should be turned out wrongfully than that the trustees and governors should be perpetually liable to have every action of theirs sifted and examined into. But yet I would recommend it to Sir John Lock, and the other gentlemen's consideration, to allow something in the meantime to the petitioners, that they may not starve, but I will not make any order for it.

Petition dismissed.

A

R. *v.* WOODFALL

[Court of King's Bench (Lord Mansfield, C.J. and other judges), June 22, July 3, November 20, 1770]

[Reported 5 Burr. 2661; 20 State Tr. 895; 98 E.R. 398]

B

Criminal Law—Mens rea—Proof by prosecution where act criminal if done with criminal intent—Implication where act in itself unlawful.

Per Lord Mansfield, C.J.: Where an act in itself indifferent becomes criminal if done with a criminal intent the prosecution must prove the intent, but where the act is in itself unlawful the proof of justification and excuse lies on the defendant, and on his failure to discharge that burden the law implies a criminal intent.

C

Criminal Law—Trial—Jury—Deliberations of jury—Affidavit by juryman—Admissibility on motion for new trial.

Where there is a doubt regarding what passed at the time of bringing in the verdict at a criminal trial the affidavits of jurors and bystanders may be received by the court on a motion for a new trial or to rectify a mistake in the record, but an affidavit by a juror regarding the deliberations of the jury or their intentions as to the matter to be adjudicated on can never be received.

D

Notes. By s. 1 of the Criminal Appeal Act 1964, power was given to the Court of Criminal Appeal to order a new trial on the ground of fresh evidence. By s. 1 of the Criminal Appeal Act 1966, the jurisdiction to hear criminal appeals was transferred to the Court of Appeal. (See 44 Halsbury's Statutes (2nd Edn.) 141 and ibid., vol. 46, p. 50.)

E

Considered: *R.* v. *Shipley* (1784), 4 Doug.K.B. 73; *R.* v. *Topham* (1791), 4 Term Rep. 126; *R.* v. *Philipps* (1805), 6 East. 464. Referred to: *Broome* v. *Agar* (1928), 138 L.T. 698.

As to mens rea, see 10 Halsbury's Laws (3rd Edn.) 273, 282–284, and as to statements by jurors, see ibid., vol. 23, p. 37. For cases see 14 Digest (Repl.) 31–41, and 30 Digest (Repl.) 292–294.

F

Cases referred to:

(1) *R.* v. *Bold* (1708), 1 Salk. 53; 91 E.R. 52; 14 Digest (Repl.) 369, *3579*.
(2) *R.* v. *Keat* (1696), 1 Salk. 47.
(3) *Cook* v. *Laneday* (1608), Cro. Jac. 210; 79 E.R. 183; 30 Digest (Repl.) 282, *504*.
(4) *Drury* v. *Dennis* (1607), Yelv. 106.
(5) *Rowe* v. *Huntington* (1670), Vaugh. 66; 124 E.R. 973; 30 Digest (Repl.) 284, *538*.
(6) *Shelley* v. *Alsop* (1605), Yelv. 77.
(7) *R.* v. *Bear* (*or Beare*) (1698), 2 Salk. 417; Carth. 407; Holt, K.B. 422; 1 Ld. Raym. 414; 3 Salk. 226; 91 E.R. 363; sub nom. *R.* v. *Beere*, 12 Mod. Rep. 218; 32 Digest (Repl.) 235, *2607*.
(8) *Paget's Case* (1584), Moore K.B. 193.
(9) *Foster* v. *Jackson* (1615), Hob. 52; 80 E.R. 201; sub nom. *Forster's Case*, Moore K.B. 857; 21 Digest (Repl.) 524, *233*.
(10) *R.* v. *Newton* (1674), 2 Lev. 111.
(11) *Pinkney* v. *Inhabitants of Rutland* (1671), 2 Saund. 379.

G

H

I

Motion by the defendant for arrest of judgment on an information by the Attorney-General, and **Cross-Motion** by counsel for the Crown calling on the defendant to show cause why the verdict should not be entered according to the legal import of the finding of the jury.

The information against the defendant by the Attorney-General was for printing and publishing in the Public Advertiser, a seditious libel signed "Junius". Upon the trial the jury found the defendant guilty of the "printing and publishing only".

Serjeant Glynn and *Lee*, for the defendant, contended that the verdict did not amount to finding Mr. Woodfall guilty of the charge in the information, but rather to acquit him of it. He was charged with printing and publishing the matter complained of as a libel with a malicious and criminal intention, but the jury had found him guilty of printing and publishing only. Whatever the jury did not find implied a negative, but this verdict went further. It said expressly that they found this and this only. A criminal motive goes to the construction of the offence: a criminal intention is its essence. This the jury have negatived. They are judges of law and fact, as far as law is involved in fact. They may take this upon them, and here they have done so. They meant to acquit the defendant of all criminal intention, and one of the jurymen has made an affidavit

> "that he meant to acquit him of all criminal construction, and, if he had thought that that could not have been thus done, he would have acquitted him."

Therefore, this cannot be considered as a verdict of conviction by twelve jurymen. A verdict ought to be found clearly, fully, and distinctly. It cannot be supplied by inference, neither can it be amended by any notes of the associate in a criminal case: *R.* v. *Bold* (1); *R.* v. *Keat* (2).

They also cited *Cook* v. *Laneday* (3); *Drury* v. *Dennis* (4); 2 Rolle's Abridgment 693, title Verdict, Letter S, pl. 5, *Baugh* v. *Philips*, referred to by Vaughan, C.J., in *Rowe* v. *Huntington* (5) (Vaugh. 75, 76), who there says

> "that finding the point in issue, by way of argument, in a general verdict is never permitted; not though the argument be necessary and conclusive."

There can be no supply by intendment, in any case, much less in the present where it is impossible to supply the verdict by intendment because nobody can know what the jury did intend or by what rule or upon what principle they decided unless affidavits from the jurymen were allowed to be read. Another authority that they cited was *Shelley* v. *Alsop* (6), which was a finding of the assumpsit by foreign implication, "which is not good [as it is there said] upon any general issue," and it is there laid down that the jury ought to give their verdict precisely according to their charge. They contended that the verdict ought to remain in the words of the jury without expunging any of their words, or substituting others in their places or controlling them under any pretence of legal construction. They ought to be left as they stand that the defendant may have the benefit of a writ of error to the House of Lords, if the opinion of this court should be against him. They hoped, however, that the present finding would be esteemed by the court to amount to an acquittal of the defendant. But, if the court should not go so far as to hold it tantamount to an acquittal, there ought at least to be a venire facias de novo. It certainly is not a conviction, and if it be not an acquittal it can be no more than an imperfect verdict. And if a verdict be imperfect, there must be a venire facias de novo. But we hope for the defendant's discharge as upon a verdict of not guilty.

The Solicitor-General (*Thurlow*), *Morton*, *Wallace*, *Dunning*, and *Walker*, for the Crown, argued that the verdict could not be considered as a verdict of not guilty. It positively and explicitly found the defendant guilty of the printing and publishing, and it did not import any negation of his guilt as to the rest. The word "only" did not import the exclusion of anything but facts. It cannot exclude conclusion of law. It is certain that a verdict cannot be amended in matters of fact, but it may be perfected in point of form. The officer takes his note short, but the necessary finishing of the sentence may be supplied. The substance and matter of this issue is sufficiently found. The court may order it into a proper form. The law here implies the intention. The printing and publishing was all that the jury were to inquire about. This verdict is not imperfect, nor is there any need of supplying anything by intendment. The intention must be collected from the libel itself. The intention is the gist of the offence. The verdict ought to be entered according to the true meaning and intention of the jury. Something

is always to be added to every verdict. The entry is never in the identical words used by the jury which are always concise and not full and formal enough to stand supported against a writ of error. Whether a jury may or may not take upon themselves to judge of matters of law, they must at least do it at their peril. Here they have not done it at all. They have not determined that this paper is not libellous. So whether they may at their peril do it or whether they may not, they have not here risked that peril. The import of their verdict is a general finding of the facts without expressing any sense of their own upon the law. In *R.* v. *Beere* (7) the jury, as to the writing and collecting of the libels only, found the defendant guilty prout in indictamento supponitur, and as to all other things charged in the indictment, præter scriptionem et collectionem, they found him not guilty. The charge was for composing, making, writing, and collecting several scandalous false and seditious libels. The finding was:

> "Quoad scriptionem et collectionem libellorum in indictamento mentionut' tantum, quod defendens est culpabilis; et quoad totum residuum in codem indictamento content,' quod defendens non est inde culpabilis."

It was held that the bare writing and collecting the libellous matter was criminal, and that the general finding should be "taken to be criminal." *Turton* and *Rokeby* cited some cases to prove that the writing of a libel, without publishing it, was punishable by indictment. They also cited *Paget's Case* (8) (Moore, K.B. at p. 194); Dyer, 362; *Foster* v. *Jackson* (9) (Hob. at p. 54); Moore, K.B. 888; *R.* v. *Newton* (10), and, to prove that the word "only" might be rejected, *Pinkney* v. *Inhabitants of Rutland* (11) (2 Saund. 380); Co. Litt. 227.

Cur. adv. vult.

Nov. 20, 1770. **LORD MANSFIELD, C.J.,** delivered the opinion of the court as follows: This comes before the court upon two rules: the first (obtained by the defendant) to stay the entering up judgment on the verdict in this cause, the second (obtained by the Attorney-General) that the verdict may be entered according to the legal import of the finding of the jury. The last rule must, from the nature of it, be first discussed, because the ground of argument upon the other cannot be settled till this is disposed of.

The prosecution is on an information against the defendant for printing and publishing a libel, in the Public Advertiser, signed "*Junius*," the tenor of which is set out with proper averments as to the meaning of the libel, the subject-matter, and the persons concerning which and of whom it speaks, with innuendos filling up all the blanks, and the usual epithets. The prosecution proved, by Nathaniel Crowder:

> "that he bought the paper produced and twelve more from Colfield, the defendant's publisher, in the defendant's publishing-room at the corner of Ivy Lane, that he goes often there, has occasionally seen the printing-room, and has had papers in the printing-room."

The tenor of the paper produced agreed with the information. George Harris, registrar of pamphlets and newspapers, proved

> "that the defendant, by himself and servants, paid the duty for advertisements in the Public Advertiser. The defendant had paid himself, and all the payments were in his account. The defendant has made the usual affidavit, and has been allowed the stamp-duty for such papers as were unsold. The duties for advertisements in the paper in question were paid by the defendant's servant, and the receipt given on the defendant's account."

William Lee, clerk to Sir John Fielding, proved:

> "that he often carried advertisements for the Public Advertiser to the defendant's at the corner of Ivy Lane. He generally paid ready money. He has seen money paid to the defendant for advertisements, and he had a receipt from

A the defendant, signed by him, Nov. 29, for £32 for printing advertisements in the Public Advertiser."

On the part of the defendant no witnesses were called. His counsel objected to some of the innuendos, but they principally applied to the jury to acquit the defendant from the paper being innocent, or not liable to the epithets given it by the information, or that the defendant's intent in publishing did not deserve B the epithets in the information. There was no doubt but that the evidence, if credited, amounted to proof of printing and publishing by the defendant. There may be cases where the fact proved as a publication may be justified or excused as lawful or innocent. For, no fact which is not criminal in case the paper be a libel, can amount to a publication of which a defendant ought to be found guilty.

But no question of that kind arose in this cause. Therefore, I directed the jury C to consider whether all the innuendos and all the applications to matter and persons made by the information were, in their judgment, "the true meaning of the paper." If they thought otherwise, they should acquit the defendant, but, if they agreed with the information and believed the evidence as to the publication, they should find him guilty. If the jury were obliged to find whether the paper was a libel, or whether it was a libel to such a degree as to deserve the epithets given it by D the information or to require proof of the express intent of the defendant in printing and publishing, and of its being malicious to such a degree as to deserve the epithets given it by the information, then this direction was wrong.

In support of it, I told the jury (as I have, from indispensable duty, been obliged to tell every jury upon every trial of this kind) to the following effect: That whether the paper, meaning as alleged by the information, was in law a libel, was a question E of law upon the face of the record, for, after conviction, a defendant may move in arrest of judgment if the paper is not a libel. That all the epithets in the information were formal inferences of law from the printing and publishing. That no proof of express malice ever was required, and in most cases, is impossible to be given. That the verdict finds only what the law infers from the fact. Therefore, after conviction, a defendant may by affidavit lessen the degree of his F guilt. That where an act in itself indifferent if done with a particular intent becomes criminal, there the intent must be proved and found, but where the act is in itself unlawful (as in this case) the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent.

The Jury stayed out a great while. At last they came to my house (the objection "of its being out of the county" being cured by consent). In answer to the usual G question put by the officer, the foreman gave their verdict in these words: "Guilty of the printing and publishing only." Nothing more passed. The officer has entered up the verdict literally without so much as adding the usual words of reference to connect the verdict with the matter to which it related.

Upon this, the two rules I have stated were moved for. Upon that obtained by the Attorney-General, the affidavit of a juror was offered by counsel for the defen- H dant. But we are all of opinion that it cannot be received. Where there is a doubt, upon the judge's report, as to what passed at the time of bringing in the verdict, there the affidavits of jurors or bystanders may be received upon a motion for a new trial or to rectify a mistake in the minutes, but an affidavit of a juror never can be read as to what he then thought or intended. This motion consists of two parts: first, to fill up the formal words of reference; the second to omit I the word "only." We are all of opinion that the first is a technical omission of the clerk and ought to be set right. As to the second we think that the word "only" must stand in the verdict. There is no ground from anything which passed to explain the sense of the jury so that the officer might have entered a general verdict. No argument can be urged for omitting the word "only" which does not prove that it can have no effect though inserted. Therefore, it is a question of law, upon the face of the verdict.

The defendant's motion must be considered upon the ground of the word "only"

standing. Was it omitted, there could be no doubt. "Guilty of printing and publishing," where there is no other charge, is "Guilty," for nothing more is to be found by the jury. In *R.* v. *Williams*, the jury found the defendant guilty of printing and publishing the NORTH BRITON. The clerk entered it up "guilty," and no objection was ever made. Where there are more charges than one, guilty of some, "only" is an acquittal as to the rest. But in this information there is no charge except for printing and publishing. Clearly, there can be no judgment of acquittal because the fact found by the jury is the very crime they were to try.

The only question is whether, by any possibility, the word "only" can have a meaning which would affect or contradict the verdict. That the law, as to the subject-matter of the verdict is as I have stated has been so often unanimously agreed by the whole court upon every report I have made of a trial for a libel that it would be improper to make it a question now in this place. Among those that concurred, the Bar will recollect the dead and the living not now here. We all again declare our opinion that the direction is right and according to law. This direction, though often given with an express request from me, "that if there was the least doubt, they would move the court," has never been complained of in court. If it had been wrong, a new trial would be of course. It is not now complained of.

Taking, then, the law to be according to this direction, the question is whether any meaning can be put upon the word "only" as it stands upon the record, which will affect the verdict. If they meant to say they did not find it a libel, or did not find the epithets, or did not find any express malicious intent, it would not affect the verdict because none of these things was to be proved, or found, either way. If, by "only," they meant to say that they did not find the meaning put upon the paper by the information, they should have acquitted the defendant. If they had expressed this to be their meaning, the verdict would have been inconsistent and repugnant for they ought not to find the defendant guilty unless they find the meaning put upon the paper by the information, and judgment of acquittal ought to have been entered up. If they had expressed their meaning in any of the other ways, the verdict would not have been affected, and judgment ought to be entered upon it.

It is impossible to say with certainty what the jury really did mean. Probably, they had different meanings. If they could possibly mean that which, if expressed, would acquit the defendant, he ought not to be concluded by this verdict. It is possible that some of them might mean not to find the whole sense and explanation put upon the paper by the innuendos in the information. If a doubt arises from an ambiguous and unusual word in the verdict, the court ought to lean in favour of a venire de novo.

We are under the less difficulty because, in favour of a defendant, though the verdict be full, the court may grant a new trial.

We are all of opinion, upon the whole of the case, that there should be a venire de novo.

Venire de novo.

A

MENETONE *v.* ATHAWES

[Court of King's Bench (Lord Mansfield, C.J., and Wilmot, J.), November 22, 1764]

[Reported 3 Burr. 1592; 97 E.R. 998]

B *Work and Labour—Work not completed—Workman's right to payment—Destruction of article on which work being done.*

Where a workman is employed to do work, but not on a contract to do an entire, completed work, and the article on which he is working is destroyed before he has finished the work, he is entitled to be paid for the work which he has done.

C **Semble:** A workman employed on such a contract is entitled at any stage to payment for the work done and to refuse to proceed until payment is made.

Notes. Referred to: *Appleby* v. *Myers*, [1861–73] All E.R.Rep. 452.

As to contracts for work and labour, see 2 Halsbury's Laws (3rd Edn.) 127–138, and cases there cited.

D

Cases referred to:

(1) *Coggs* v. *Bernard* (1703), ante, p. 1; 2 Ld. Raym. 909; 1 Com. 133; Holt, K.B. 13, 131; 1 Salk. 26; 3 Salk. 11; 92 E.R. 107; 8 Digest (Repl.) 18, *92*.

(2) *Amies* v. *Stevens* (1718), 1 Stra. 127; 93 E.R. 428; 8 Digest (Repl.) 21, *117*.

E

(3) *Hartop* v. *Hoare* (1743), 3 Atk. 44; 2 Stra. 1187; 1 Wils. 8; 26 E.R. 828; 37 Digest (Repl.) 3, *3*.

Action by a shipwright for payment for work and labour done and materials provided in repairing the defendant's ship.

F The ship, being damaged, was obliged to put back in order to be repaired in dock. She was to have gone out of the dock on a Sunday. On the day before the Sunday, when only three hours' work was wanting to complete the repair, a fire happened at an adjacent brew-house and was communicated to the dock, with the result that the ship was burnt. The dock in which was the ship was the shipwright's own dock, and the owner of the ship had agreed to pay him £5 for the use of it.

G

Murphy, for the plaintiff, argued that the plaintiff was not answerable for the loss of the ship, which happened without his neglect or default; in the absence of any special undertaking. A tenant was bound to provide the landlord with as good a house should the one demised to him be burned, if he had covenanted to deliver up the house in as good repair as it was when let. On such a special undertaking an action would lie, but not otherwise. In the case of wagoners and

H common carriers, they were bound to answer for the goods against all events, except acts of God, and of the enemies of the King: *Coggs* v. *Bernard* (1); *Amies* v. *Stevens* (2). A gaoler was excuseable from escapes in those cases: 1 Roll. Abr. 808, pl. 5, 6. In like manner, where it was the act of God, the person who had the custody of another man's property was excused. The plaintiff here was

I a general bailee only, and, therefore, not chargeable: 1 Inst. 89. He was only obliged to keep the ship as he would keep his own. Even a pawn remained the property of the original owner: *Hartop* v. *Hoare* (3). The plaintiff was considered as a mere bailee for safe custody only. The plaintiff, therefore, was not answerable for the loss of the ship, and if he be not liable for the loss of the ship he was entitled to be paid for his work and materials. The materials must be considered as having been delivered. The plaintiff paid £5 for the hire of a dock; he agreed to do in this case. The materials were delivered on board his ship in this dock. The defendant might have sold this ship while it was in the dock, and these

materials would have been part of it. The fixing of them to the ship was a delivery of them. The adjunct must go with the subject.

Dunning, for the defendant: The question is whether the plaintiff is entitled to be paid by the defendant for that work and labour from which the defendant neither did nor could reap any advantage. The plaintiff was obliged to deliver the ship safe, having undertaken to repair it. The defendant has had no benefit from the plaintiff's labour or materials. Neither was the plaintiff's undertaking completely performed. Carriers and hoymen cannot be entitled to be paid for carrying things that perish before they are delivered, nor jewellers for setting a jewel that is destroyed before it is set. So a tailor, where the cloth is destroyed before the suit is finished. So of any unfinished incomplete undertaking. As there is no express agreement to support this action, the court will not imply any.

Murphy, in reply: As to the defendant's not having had the benefit of the repair, there is no reason why the shipwright should not be paid for his work and labour and materials: DIGEST, title De Negotiis gestis. The defendant might have insured his ship. Nothing can be due to a carrier or hoyman till the delivery of the goods at the destined place, but these materials were delivered and the work and labour actually done. Suppose a horse sent to a farrier's to be cured is burnt in the stable before the cure is completely effected, shall not the farrier be paid for what he has already done? A pawnbroker, if the pawn is destroyed by the act of God, shall recover the money lent.

LORD MANSFIELD, C.J.: This is a desperate case for the defendant (though compassionate). I doubt it is very difficult for him to maintain his point. Besides, it is stated that he paid £5 for the use of the dock.

WILMOT, J.: So that it is like a horse that a farrier was curing being burnt in the owner's own stable.

Judgment for plaintiff.

HOWARD *v.* HARRIS

[Lord Keeper's Court (Lord Guilford), November 6, 1683]

[Reported 1 Vern. 190; 8 Cas. in Ch. 147; 1 Eq. Cas. Abr. 312; Freem. Ch. 86; 23 E.R. 406]

Mortgage—Redemption—Clog on equity—Restriction of right to redeem to heirs male of mortgagor.

Any clog or fetter on the equity of redemption in a mortgage is invalid and void, and, therefore, an express agreement between mortgagor and mortgagee that the mortgage shall be redeemable only in certain circumstances (e.g., where there was a restriction of the right to redeem to the heirs male of the mortgagor) is unenforceable.

Mortgage—Interest—Compound interest—Payment by mortgagor—Validity.

A mortgagor can validly agree to pay compound interest, i.e., that interest in arrear shall be capitalised and bear interest as in the case of the original advance.

Notes. Considered: *Newcombe* v. *Bonham* (1681), Freem. Ch. 67. Distinguished: *Bunning* v. *Bunning* (1822), 1 L.J.O.S.Ch. 56. Considered: *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*, [1911–13] All E.R.Rep. 970. Referred to: *Jones* v. *Meredith* (1739), 2 Com. 661; *Rice* v. *Noakes*, [1900] 2 Ch. 445; *I.R.Comrs.* v. *Lawrence, Graham & Co.*, [1937] 2 All E.R. 1.

As to restrictions on the right to redeem and payment of compound interest, see 27 Halsbury's Laws (3rd Edn.) 203, 204, 235–239. For cases see 35 Digest (Repl.) 279–283, 742, 743.

Cases referred to:

(1) *Kilvington* v. *Gardiner* (1678), cited sub nom. *Illington* v. *Gardiner*, Freeman Ch. 68; sub nom. *Killington* v. *Green*, 2 Cas. in Ch. 148.

(2) *Jason* v. *Eyres* (1681), Freem. Ch. 69; 2 Cas. in Ch. 33; 22 E.R. 1064, L.C.; 35 Digest (Repl.) 279, *16.*

Bill for redemption of a mortgage.

One Howard settled a jointure on the plaintiff, his wife, before marriage, which proving defective and not of value according to the marriage agreement, he afterwards made her an additional jointure of other lands. Later, in 1673, Howard made a mortgage to the defendant Harris for securing £1,000 with interest, in which part of the lands belonging to the additional jointure was comprised. In the mortgage there was a special clause of redemption, viz., that if Howard, or the heirs males of his body, should in June, 1686, pay the principal sum of £1,000 and £60 a year interest in the meantime, then Howard or the heirs males of his body might re-enter, and Howard covenanted that no one but he or the heirs males of his body should be admitted to redeem this mortgage, and he covenanted to pay the £1,000 on the —— day of ——— in the year, 1686, and £60 a year interest in the meantime by half-yearly payments from the date of the mortgage. Howard died without issue, and the plaintiff, being a jointress of part of the mortgaged lands, in 1677 exhibited her bill to redeem the mortgage. The defendant pleaded that the lands comprised in the mortgage had become irredeemable.

This cause was heard before Lord Nottingham, L.C., and now, upon the defendant's petition, it came to be re-heard before Lord Guilford, Lord Keeper, and was by them both decreed for the plaintiff.

For the plaintiff it was insisted (i) that restrictions of redemption in mortgages had been always discountenanced in that court, and it would be a thing of mischievous consequence should they prevail, for then it would become a common practice and a trade among the scriveners so to fetter the mortgagors as to make it impracticable for them to redeem according to the precise letter of the agreement. There was no more in this case against a redemption than there was in

every mortgage. It was true that here was an express covenant that none but Mr. Howard or the heirs males of his body should redeem, and in every mortgage there was a proviso that if the money be not paid by such a day the mortgagee should hold the land discharged. Not only so, but there was likewise an express covenant for further assurance, so that in every mortgage the agreement of the parties upon the face of the deed seemed to be that a mortgage should not be redeemable after forfeiture. (ii) It was argued that it was a maxim here that an estate could not at one time be a mortgage and at another time cease to be so by one and the same deed. A mortgage could no more be irredeemable than a distress for a rent-charge could be irrepleviable. The law itself would control that express agreement of the party, and by the same reason equity would let a man loose from his agreement and would against his agreement admit him to redeem a mortgage. (iii) It was another standing rule that a mortgage could not be a mortgage of one side only. Here it was plain that the defendant might make it a mortgage, for he had a covenant for the repayment of his mortgage-money. *Kilvington* v. *Gardiner* (1), where the mortgagor was to redeem at any time in his lifetime, and *Sir Robert Jason's Case* [*Jason* v. *Eyres* (2)].

For the defendant it was argued that this express agreement of the parties ought to be pursued. It was made on good consideration, viz., that the defendant Harris had formerly purchased these very lands from Sir Robert Howard, father of the plaintiff's husband, who pretended himself to be seised in fee, but the land was afterwards evicted on pretence that Sir Robert was only tenant for life. The reason of the special clause of redemption was that, if Mr. Howard should have issue male, the estate might remain in the family, but, if he had none, it should be left to the defendant as something towards a compensation for the loss in his purchase. Mr. Harris was to submit to the loss and not to question Mr. Howard's title. But as to this they had not a word of it in proof, saving only that the defendant had made such a purchase, but not that this was the consideration of the agreement. It likewise appeared that Mr. Howard claimed by an ancient settlement from Lord Suffolk and not by any settlement made by his father Sir Robert. Then it was contended that the additional jointure was voluntary and the plaintiff ought not to take the estate out of the hands of a purchaser. But it was answered that he was a purchaser for no more than his mortgage-money, and one that came in by a voluntary conveyance might redeem a mortgage. If the additional jointure were voluntary, so likewise was the agreement that none but Mr. Howard or the heirs males of his body should redeem, and that was subsequent to the additional jointure. It was further urged that the mortgaged estate was a reversion after lives only, and was at present but £7 a year. Mr. Harris did actually borrow the mortgage-money to lend on this reversion, and it could not be presumed he would have so done unless it had been in consideration that this mortgage had been made in a special manner redeemable. It was answered that possibly the defendant might design such a catching bargain of this mortgage, but that was a sort of circumvention, and the worst part of the case.

After long debate, **LORD GUILDFORD, Lord Keeper,** decreed that the mortgage should be redeemed, the rather for that the defendant had a covenant for repayment of his mortgage-moneys, but he said that, if the case had been that a man had borrowed money of his brother and had agreed to make him a mortgage, and, if he had no issue male, his brother should have the land, such an agreement made out by proof might well be decreed in equity.

For the mortgagee it was insisted that, this mortgage having been made ten years since, and of a reversion where £7 a year rent was only reserved, the defendant ought to have interest upon interest, otherwise he would be a great loser. As to that it was answered that the plaintiff's bill to redeem was filed so long since as 1677, and that the defendant had by answer opposed the redemption. Therefore, from that time he had no pretence to an allowance of interest for his

damages, and it was never known in this court that interest upon interest was at any time allowed in any case.

But the LORD KEEPER was clearly of opinion that as to so much interest as was reserved in the body of the deed that should be reckoned principal, for, it being ascertained by the deed, an action of debt would lie for it, and, therefore, it was reasonable that there should be damages given for the non-payment of that money. It had been urged that this had never been practised and that there was not any such precedent in the court, and that, if this were to be established for a rule, every scrivener would reserve all his interest half-yearly from time to time as long as the money should be continued out upon the security: which would be to change the law and practice in this court, and make all mortgagors pay interest upon interest. But the LORD KEEPER said he was clear in that distinction between debt and damages and he saw no inconvenience that could ensue. It would serve only to quicken men to pay their just debts, and he, accordingly, decreed that after a deduction of the yearly rents of the mortgaged premises out of the £60 a year payable for the interest, the defendant should be allowed interest for the residue of the said £60 a year for which the defendant might have sued at law and recovered damages.

HAYNES' CASE

[COURT OF KING'S BENCH, Lent, 1614]

[Reported 12 Co. Rep. 113; 2 East, P.C. 652; 77 E.R. 1389]

Criminal Law—Larceny—Burial shroud—Ownership.

The property in a winding sheet remains in him to whom it belonged when the dead body was wrapped in it, for the dead body is not capable of possessing it. Larceny, therefore, may be committed in respect of it.

Infant—Gift—Competency to receive gifts—Clothes.

Per Curiam: If apparel is put on a boy, it is a gift in law, for the boy has capacity to take it.

Chattel—Ownership—Relinquishment—Need for property to vest in another.

Per Curiam: A man cannot relinquish his property in goods unless they be vested in another.

Notes. The third point in the headnote appears to conflict with the right of a person to abandon goods. Abandonment of goods takes place when the possession of them is quitted voluntarily without any intention of transferring them to another: see 10 HALSBURY'S LAWS (3rd Edn.) 777, para. 503, and ibid., vol. 29, p. 371, note (d).

As to possession, property and theft concerning a dead body, see 4 HALSBURY'S LAWS (3rd Edn.) 3 et seq.; and for cases see 15 DIGEST (Repl.) 1077, and 37 DIGEST (Repl.) 181 et seq.

Indictments of William Haynes for larceny, tried at the Lent Assize held at Leicester in 1614. William Haynes had dug up the graves of three men and one woman during the night, and had taken the winding sheets from their bodies, and buried them again.

It was resolved by the justices at Serjeants' Inn, Fleet Street, that the property of the sheets remained in the owners, that is, in those who had property in them when the dead body was wrapped therewith, for the dead body is not capable of possessing it. If apparel be put on a boy, this is a gift in the law, for the boy

has capacity to take it, but a dead body, being but a lump of earth, has no capacity. Also, it is no gift to the person but bestowed on the body for the reverence towards it to express the hope of resurrection. Also, a man cannot relinquish the property he has to his goods unless they be vested in another.

Accordingly, at the assizes [Haynes] was severally indicted for taking each of these sheets. The first indictment was of petty larceny, for which he was whipped. At the same assizes he was indicted for the felonious taking of the three other sheets, for which he had his clergy, and so escaped the sentence of death which he well deserved for this inhuman and barbarous felony.

PINNEL'S CASE

[Court of Common Pleas, Trinity Term, Trinity Term, 1602]

[Reported 5 Co. Rep. 117 a; Moore, K.B. 677; 77 E.R. 237]

Accord and Satisfaction—Accord without satisfaction—Payment of less than sum due on the day.

Accord and Satisfaction—Satisfaction—Gift in satisfaction—Part payment before the day.

Payment of a lesser sum in satisfaction of a greater cannot be any satisfaction for the whole, but the gift of a horse, hawk, or robe, etc., in satisfaction is good, for it shall be intended that they might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted. For the same reason payment and acceptance of part before the day in satisfaction of the whole would be a good satisfaction; so payment at a different place. The payment of part ought to be pleaded to be paid in full satisfaction: it is not sufficient to aver that it was accepted in full satisfaction.

The manner of the tender and of the payment of a debt shall be directed by him who made them and not by him who accepts them.

If a man acknowledges himself to be satisfied by deed, it is a good bar without anything received.

Notes. Considered: *Curlewis* v. *Clark* (1849), 3 Exch. 375. Followed: *Foakes* v. *Beer*, [1881–5] All E.R.Rep. 106. Considered: *Bidder* v. *Bridges* (1887), 37 Ch.D. 406. Applied: *D. & C. Builders, Ltd.* v. *Rees*, [1965] 3 All E.R. 837. Referred to: *Fletcher* v. *Uriell* (1667), 2 Keb. 285; *Geang* v. *Swaine* (1687), 1 Lut. 464; *Young* v. *Rudd* (1694), 5 Mod. Rep. 86; *Colt* v. *Nettervill* (1725), 2 P.Wms. 303; *Roades* v. *Barnes* (1756), 1 Keny. 391; *Stock* v. *Mawson* (1798), 1 Bos. & P. 286; *Fitch* v. *Sutton* (1804), 5 East, 230; *Steinman* v. *Magnus* (1809), 11 East, 390; *Bramston* v. *Robins* (1826), 12 Moore, C.P. 68; *Webb* v. *Weatherby* (1835), 1 Bing.N.C. 502; *De Wolf* v. *Bevan* (1844), 13 M. & W. 160; *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Underwood* v. *Underwood* (1894), 70 L.T. 390.

As to accord and satisfaction, see 8 Halsbury's Laws (3rd Edn.) 206 et seq.; and for cases see 12 Digest (Repl.) 516 et seq.

Action of debt on a bond.

Pinnel brought an action of debt on a bond against Cole, of £16 conditional for the payment of £8 10s. on Nov. 11, 1600. The defendant pleaded that he, at the instance of the plaintiff, before the said day, to wit, on Oct. 1, at the house of W., paid to the plaintiff £5 2s. 2d., which the plaintiff accepted in full satisfaction of the £8 10s.

A **It was resolved** by the whole court that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk or robe, etc., in satisfaction is good, for it shall be intended that a horse, hawk or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, B or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff.

In the case at Bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be C more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So if I am bound in £20 to pay you £10 at Westminster and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10 it is a good satisfaction for the whole for the expense to pay it at York, is sufficient satisfaction.

But in this case the plaintiff had judgment for the insufficient pleading, for he D did not plead that he had paid the £5 2s. 2d. in full satisfaction (as by the law he ought) but pleaded the payment of part generally; and that the plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it.

Judgment for plaintiff.

E

See, said Sir Edward Coke in his report, 26 Hen. 6, Barre 37, in debt on a bond of £10 the defendant pleaded that one F. was bound by the said deed with him, and each in the whole, and that the plaintiff had made an acquittance to F. bearing date before the obligation, and delivered after, by which acquittance he did acknowledge himself to be paid 20s. in full satisfaction of the £10. It was F adjudged a good bar, for if a man acknowledges himself to be satisfied by deed, it is a good bar without anything received. Vide 12 Rich. 2, Barre 243; 26 Hen. 6, Barre 37, and 10 Hen. 7, etc.

FISHMONGERS' CO. *v.* EAST INDIA CO.

[Lord Chancellor's Court (Lord Hardwicke, L.C.), March 18, 1752]

[Reported 1 Dick. 163; 21 E.R. 232]

Easement—Light—Obstruction—Interference must amount to actionable nuisance.

To sustain an action for interference with light it must be shown that the interference amounts to a nuisance. It is not sufficient to prove a mere diminution of the light enjoyed by the dominant tenement not amounting to an actionable nuisance.

Notes. The Rights of Light Act, 1959 (39 Halsbury's Statutes (2nd Edn.) 285 et seq.) has amended the law as to right of light in certain respects.

Considered: *A.-G.* v. *Nichols* (1809), 16 Ves. 338. Explained: *Jackson* v. *Newcastle* (1864), 3 De G.J. & Sm. 275. Considered: *Colls* v. *Home and Colonial Stores, Ltd.*, [1904–7] All E.R.Rep. 5; *Jolly* v. *Kine*, [1907] A.C. 1. Referred to: *Wynstanley* v. *Lee* (1818), 2 Swan. 333; *Squire* v. *Campbell* (1836), 1 My. & Cr. 459; *Soltan* v. *De Held* (1851), 2 Sim.N.S. 133; *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G.M. & G. 304; *Arcedeckne* v. *Kelk* (1858), 32 L.T.O.S. 331; *Warren* v. *Brown*, [1900] 2 Q.B. 722; *Rushmer* v. *Polsue and Alfieri*, [1906] 1 Ch. 234; *Paul* v. *Robson* (1914), 83 L.J.P.C. 304; *Fishenden* v. *Higgs and Hill, Ltd.*, [1935] All E.R.Rep. 435.

As to the nature of the right of light and as to prospect or privacy not being an easement, as such, see 12 Halsbury's Laws (3rd Edn.) 582 et seq., 614, respectively; and for cases, see 19 Digest (Repl.) 146. As to interference with prospect or view, with reference to nuisance, see 28 Halsbury's Laws (3rd Edn.) 140; and for cases see 19 Digest (Repl.) 196.

Motion by the plaintiffs that the brick wall built by the defendants close to the wall of the yard, or terrace belonging to the plaintiffs' house in Fenchurch Street, London, so far as the same obstructed, darkened, or obscured the plaintiffs' ancient window lights, might be taken down and removed, and for an injunction.

Counsel for the plaintiffs proposed a trial as to the measure of damages required were the intended erection carried higher than their house. But the defendants' counsel declined it, and contended that as there was a space of seventeen feet between the plaintiffs' house and their buildings, it could not be considered as a nuisance, there being many streets and lanes in London not so wide; though they admitted it might in some measure obscure the plaintiffs' lights. They also contended for a right to build on their own ground.

LORD HARDWICKE, L.C.—With respect to granting trials, it is never done but by consent of parties, or with their acquiescence. Here the defendants decline a trial; therefore, the question is whether the plaintiffs' case is such as entitles them to an injunction. As to the necessity of this case there is no ground for an injunction, there being no immediate mischief likely to ensue. As to the question whether the plaintiffs' messuage is an ancient building, so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here, for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. If the house were built on the old foundation, it would entitle the plaintiffs to their lights as an ancient messuage, but if on the new foundation, then the party must show a new agreement, or something to import one. The evidence as to that is not clear.

I am of opinion it is not a nuisance contrary to law, for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city, and here will be seventeen feet distance, and the law says

A it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground.

Motion dismissed.

B

C

EAST INDIA CO. *v.* VINCENT

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), November 15, 1740]

[Reported 2 Atk. 83; 26 E.R. 451]

Estoppel—Estoppel by conduct—Acquiescence—Building on ground of another—Owner standing by—Builder allowed to enjoy quiet possession.

D Per LORD HARDWICKE, L.C.: There are several instances where a man has suffered another to go on building on his ground and has not set up a right till afterwards, when he was all the time cognisant of his right, and the person building had no notice of that right, in which cases the court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance. But these cases have never been extended so far as E where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement. There, if persons will build notwithstanding, they must take the consequence, and this is not such an acquiescence on the part of the owner as will prevent him from insisting on his right.

Notes. Explained: *Blakemore* v. *Glamorganshire Canal Navigation Co.*, [1824–34] All E.R.Rep. 443. Distinguished: *Harryman* v. *Collins* (1854), 18 Beav. 11. F Considered: *McManus* v. *Cooke* (1887), 35 Ch.D. 681.

As to manner of creating easement, see 12 HALSBURY'S LAWS (3rd Edn.) 532; and for cases see DIGEST (Repl.) 26 et seq. As to where burden of easement increased, see 12 HALSBURY'S LAWS (3rd Edn.) 565; and for cases see 19 DIGEST (Repl.) 158. As to acquiescence, see 14 HALSBURY'S LAWS (3rd Edn.) 638 et seq.; and as to cases see 21 DIGEST (Repl.) 451 et seq.

G **Bill** in Chancery.

The plaintiffs owned an ancient messuage in Leadenhall Street, London, abutting on the north and east sides on a small piece of ground used as a yard in the possession of the defendant. The plaintiffs' messuage had ancient windows on the east side overlooking the yard. The plaintiffs pulled down the messuage, and H were rebuilding it, intending to make new windows not only where the old ones were on the east side, but also new windows on the north side looking on the defendant's yard, and the defendant, in conversation with a director of the plaintiff company, said he would oppose the making of such lights unless the sashes of the windows on the east as well as on the north side were made so as not to slide, and wrinkled glass put in the lower part of such windows. If that were done he agreed that the windows might be finished and the plaintiffs have the benefit I thereof, and about the same time he applied to be employed by the plaintiffs as a packer. The windows were made as the defendant desired, and he was employed as a packer for some time. He was then discharged, but was again taken into their service, and they continued him in the employment. The defendant had lately begun a building in his yard which darkened the plaintiffs' windows. The defendant pleaded the Statute of Frauds.

LORD HARDWICKE, L.C.—There are several instances where a man has suffered another to go on with building on his ground, and has not set up a right

till afterwards, when he was all the time cognisant of his right and the person building had no notice of that right, in which cases the court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance. But these cases have never been extended so far as where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement. There, if persons will build notwithstanding, they must take the consequence, and this is not such an acquiescence on the part of the owner as will prevent him from insisting on his right.

If I should give an opinion that lengthening of windows, or making more lights in the old wall than there were formerly, would vary the right of persons, it might create innumerable disputes in populous cities, especially in London, and, therefore, I do not give an absolute opinion, but I should rather think it does not vary the right.

Where an agent of the East India Co. is in treaty with an owner of ground for a liberty for the company to build, and the owner, at the time of the treaty, in consideration of his consent, insists upon terms to which the agent makes no answer or objection, but immediately afterwards the company think proper to build, the silence of the agent shall be construed an acquiescence under the proposal of the owner of the ground, and shall bind the company his principals, as being in the consideration of this court the agreement of the agent. I am of opinion that notwithstanding the company's dismissing the defendant from their service as a packer contrary to their agreement between him and the agent of the company, yet he is not justified in building a wall merely to block up the lights, but he might have brought his bill in this court to establish the agreement between him and the company's agent as a compensation for consenting the company should build on his ground.

On the whole, I must decree the wall erected by the defendant to be pulled down; but then I must direct in his favour that the company do employ him double to any other packer during his term in the estate, provided he does it at the same rates that people of the same trade would do.

[The defendant was ordered at his own expense to remove the wall, and was restrained from making any other building or erection whereby the plaintiffs' said lights might be obstructed.]

A

ATTORNEY-GENERAL *v.* MIDDLETON

[Lord Chancellor's Court (Lord Hardwicke, L.C.), July 4, 1751]

[Reported 2 Ves. Sen. 327; 28 E.R. 210]

B *Charity—Visitor—Visitatorial power—Grant—Form of words—Capacity of governors—Disqualification by receipt of charity revenue—Division of visitatorial power.*

There is no technical form of words for granting visitatorial power; the grant may be by any words bearing the required meaning. In some cases the appointment of governors of a charity will give them that power. Where the revenue of the charity is vested in the governors that excludes them from exercising visitatorial jurisdiction, for they cannot visit themselves, but governors are not precluded from being visitors merely because the legal estate of the charity is vested in them.

C

Visitatorial power may be divided, one set of visitors being appointed to one purpose and another to another purpose.

D *Charity—Crown—General jurisdiction to regulate.*

Where a charity has been founded for particular purposes and there is no charter given by the Crown to found and regulate it, the King has a general jurisdiction to regulate it. But if there is a charter with proper powers there is no ground to come into a court of equity to establish that charity, which must be regulated in the manner the charter has put it.

E *Corporation—Byelaws—Repeal—Presumption from non-observance.*

Per Lord Hardwicke, L.C.: Where it appears that a byelaw of a corporation has never been observed, the court will presume the making by the corporation of a subsequent byelaw to repeal it.

Notes. The statute of 43 Eliz. 1, c. 4 (1601) (Charitable Gifts) was repealed by s. 13 of the Mortmain and Charitable Uses Act, 1888, repealed by s. 38 of the Charities Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 168). Charities governed by Royal charter and the court's jurisdiction to make a scheme is provided under s. 15 of the Charities Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 141). The taking of charity legal proceedings is dealt with by s. 28 of the Charities Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 159).

F

G Referred to: *A.-G.* v. *Foundling Hospital*, [1775–1802] All E.R.Rep. 522; *A.-G.* v. *Smythies* (1836), 2 My. & Cr. 135; *Re Whitworth Art Gallery Trusts, Manchester Whitworth Institute* v. *Victoria University of Manchester*, [1958] 1 All E.R. 176.

As to the visitor of a charity, charities of Royal foundation, duty of attorney-general and court, liability for costs, see 4 Halsbury's Laws (3rd Edn.) 408 et seq.; 416, 441, 459 et seq., respectively, and Supp.; and for cases see 8 Digest (Repl.) 507, 510, 520, 521, 530. As to power of corporation to make byelaws, see 9 Halsbury's Laws (3rd Edn.) 41; and for cases see 13 Digest (Repl.) 251.

H

Cases referred to:

(1) *Eden* v. *Foster* (1726), 2 P.Wms. 325; Cas. temp. King, 36; 24 E.R. 750; sub nom. *Birmingham School Case*, Gilb. Ch. 178; 8 Digest (Repl.) 507, *2305.*

I

(2) *A.-G.* v. *Talbot* (1748), 1 Ves. Sen. 78; 3 Atk. 662; 27 E.R. 903, L.C.; 8 Digest (Repl.) 507, *2307.*

(3) *Sutton Colefield Case* (1635), Duke, 68; 8 Digest (Repl.) 470, *1720.*

(4) *Sutton's Hospital Case* (1612), ante, p. 11; 10 Co. Rep. 23 a; Jenk. 270; 77 E.R. 96, Ex. Ch.; 8 Digest (Repl.) 502, *2223.*

Information against the master and governors of a school upon the general principle of the power of this court to call the trustees to account as having the general superintendency of all charitable donations and trusts.

Two general questions arose. First, whether it was properly brought as to the general jurisdiction of this court, and whether, supposing a ground of complaint, there were not proper officers or visitors to take cognisance thereof. Next, supposing that the court had clearly a jurisdiction, whether there were sufficient grounds on the evidence to give the relief prayed.

LORD HARDWICKE, L.C.—By the evidence on the part of the relator it seems that this information, though with a plausible appearance on the face, is upon as slight grounds and as wrong motives as ever were known.

As to the first question, I am of opinion upon the nature of this foundation that it is not proper, and that the rectifying and regulating what is wrong in the exercise of the power of this charity should have been in another method of proceeding. I am not a judge disposed and inclined to extend visitatorial powers because they are summary and arbitrary (in a reasonable and just sense of the word) and, therefore, liable to abuse. But notwithstanding, if it is in any case proper that such jurisdiction, if founded in law, should receive allowance, it is certainly in the case of a small grammar school with an endowment originally of £50 only in the charter, and now at this distance of time but little above £80.

Consider the nature of this foundation. It is at the petition of two private persons by charter of the Crown, which distinguishes this from cases of the statute of 43 Eliz. 1, c. 4 (1601) (Charitable Gifts) on charitable uses or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein, and no charter given by the Crown to found and regulate it, unless a particular exception out of the statute it must be regulated by commission. But there may be a bill by information in this court founded on its general jurisdiction. That is from necessity, because there is no character to regulate it, and the King has a general jurisdiction of this kind. There must be somewhere a power to regulate, but where there is a charter with proper powers, there is no ground to come into this court to establish that charity, and it must be left to be regulated in the manner the charter has put it or by the original rule of law. Therefore, though I have often heard it said in this court that if an information is brought to establish a charity, praying a particular relief and method of regulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment: that is always with this distinction, where it is a charity at large or in its nature before that statute on charitable uses, but not in the case of charities incorporated established by the King's charter under the Great Seal, which are established by proper authority allowed.

Queen Elizabeth 1, granted a charter, which amounted to a licence in the first instance to found a free school and almshouse. Then the Queen founded them. It was at the petition of Heath and Gilpin, the latter of which was the great apostle of the North, and did a great deal of good, being very strenuous for the Reformation. The governors had a power to appoint and to remove the master and usher, and to do every other matter as was necessary and expedient for the scholars, etc., a very large and full power: but over and above that there is a control placed over the governors, a power being reserved to the heirs of Heath and successors of Gilpin as rector of Howton, to appoint governors from time to time, and to remove those governors as often as found convenient. What is the result? Whether either the governors or the heir of Heath has a visitatorial power over this school? It has been determined, and expressly in the *Birmingham School Case* (1), that there is no technical form of words for granting a visitatorial power, but it may be by any words showing that meaning [see *A.-G.* v. *Talbot* (2)]; therefore, it is held there that the very appointment of governors of a hospital will give that power. This is as large a power as can be given, but it is subject to some control. Visitatorial power may be divided, one set of visitors to one purpose, and another to another purpose, as in several colleges, and as was held in that great question of Trinity College as to the bishop and the Crown.

A The result, then, is this. If it had rested singly on the power given to governors, I should be of opinion that the governors were visitors. But it is objected that here the estate and revenue is vested in the governors, and then they cannot be visitors because they cannot visit themselves. That is a material objection, and was so held in the *Sutton Colefield Case* (3) because they might misapply the revenues, but it is never held that the governors cannot be visitors because merely B the legal estate of the charity vested in them. It is the very case of *Sutton's Hospital* (4), which is founded just as Queen Elizabeth I did in this case. What they went on there was that the vesting the legal estate of the corporation in the governors was not such as would exclude from the right of governing and visiting, for none of the money could come to the hands of the governors, though, if they had been to receive the rents and profits and to apply them, that might have been C of another consideration, and might exclude them. Here these governors have only the legal estate in them, not receiving the revenue, which the master does from time to time, and accounts for it, which brings it to that case. In another respect, indeed, this differs from that, in that here is another superintendence over those very governors, and a visitatorial power may be divided. If, then, the governors are not visitors, the heir of Heath and successor of Gilpin are certainly D visitors, and the power to remove governors includes everything. It is clear, therefore, that this is a foundation of the same nature with that of *Birmingham School Case* (1). The visitatorial power is either by the governors themselves or in the heir of Heath and successor of Gilpin, who meant to vest the whole power in his successor to the rectory.

As to what is said relating to this information complaining of misapplication E of the revenue by the governors, which is a misbehaviour they cannot correct, there is no weight in that objection, for there is no complaint of the governors applying anything of it to their own use. No court of equity, therefore, would decree them to pay that money out of their own pocket backward, but will only regulate for the future, which is by removing those governors. This is clearly not a case within the statute of 43 Eliz. 1, c. 4, for charitable uses, but excepted F out of it, for this is a free school which has special governors appointed by the founder. It is true that an information in name of the Attorney-General, as an officer of the Crown, was not a head of that statute because that original jurisdiction was exercised in this court before, but that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the Crown. On the whole of this point, therefore, I am of G opinion that this information is improperly brought in respect of the jurisdiction, and certainly there are somewhere visitors of this charity, for the proper place to apply for misbehaviour would be to the governors. If they refused, it would be a misbehaviour, and then application should be to the rector, etc., to remove them and appoint others.

H The next point deserves to be considered, as to which the first and principal relief prayed was to remove this master as not qualified by the statutes and to appoint another. There is no ground for the court to interpose for that purpose in the first instance. No application has been made to the governors to remove the master, which they have express power to do prescribed by the charter. That would be going per saltum, and an improper way: so that, if the visitors were I out of the case, it should not come to this court but on the gross misbehaviour of the governors. Next it is said the governors have made an improper election, for which these statutes are produced. There is no name of the person giving these statutes, and no date. It is pretty odd to come to this court to execute statutes of a private foundation under a charter, of which I never knew an instance, nor do the statutes appear to be observed in any one instance. I must presume a repeal of them, and a court of law would do so on evidence to a jury, for the rule of law is that a corporation has power to make byelaws. A court of common law will direct a jury to find a byelaw, and on account of non-observance

will presume a subsequent byelaw to repeal it. That is the nature of the case; and it would be so at law.

Shall I enter into that after this length of time? Nor are the qualifications required by the statutes such as this court would make a strain for. As to the application of the revenue thereby to the scholars, it seems to be arbitrary according to the found discretion of the governors, as they see cause, but things and times have been altered since that, for, though at the Reformation greater invitations were made to bring the poor to schools, that is not so proper now, for at present the poor had better be trained up to agriculture. So that it would be to no purpose to decree the governors to pay this trifle of 7d. per week, as the statutes require, to the poor scholars, for it would not be sufficient for them, nor should I make a decree for the governors to carry this into execution, if the first point was out of the case.

There is no ground, therefore, on either point to give relief; and this information ought to be dismissed, and that certainly with costs because it appears to proceed from a private motive of revenge in the relator, and that from a very improper cause.

Information dismissed with costs.

CARTER AND ANOTHER *v.* MURCOT AND ANOTHER

[Court of King's Bench (Lord Mansfield, C.J., Yates and Aston, JJ.), November 9, 1767, February, 1768]

[Reported 4 Burr. 2162; 98 E.R. 127]

Fishery—River—Navigable river—Right to fish—Presumption—Right in Crown—Rebuttal—Acquirement of exclusive right by prescription or grant.

In rivers which are not navigable the owners of the land have the right to fish on their respective sides, a right which generally extends ad filum medium aquæ. But in navigable rivers the riparian owners do not have the exclusive right to fish; the fishery is common; it is in prima facie in the Crown and the public. This presumption, however, can be rebutted by proof of a right acquired by prescription, or, **semble,** a grant.

Cases referred to:

(1) *Lord Fitzwalter's Case* (1674), 1 Mod. Rep. 105; 3 Keb. 242; 86 E.R. 766; 25 Digest (Repl.) 16, *138.*

(2) *Warren* v. *Matthews* (1703), 1 Salk. 357; 6 Mod. Rep. 73; 91 E.R. 312; 25 Digest (Repl.) 5, *11.*

(3) *Ward* v. *Creswell* (1741), Willes, 265; 125 E.R. 1165; 25 Digest (Repl.) 5, *12.*

(4) *Constable's Case* (1601), 5 Co. Rep. 106 a; Stuart Moore's Law of Foreshore and Seashore, 233; 77 E.R. 218; 47 Digest (Repl.) 711, *565.*

(5) *Royal Fishery of Banne Case* (1610), Dav. Ir. 55; 25 Digest (Repl.) 5, **4.*

Notes. Referred to: *Blundell* v. *Catterall*, [1814–23] All E.R.Rep. 39; *R.* v. *Stimpson* (1863), 4 B. & S. 301; *Murphy* v. *Ryan* (1868), 16 W.R. 678.

As to fisheries in tidal waters, see 17 Halsbury's Laws (3rd Edn.) 300–303. For cases see 25 Digest (Repl.) 4–9.

Rule Nisi for an order for arrest of judgment in an action of trespass for breaking and entering the plaintiff's close called the River or the River Severn.

The defendant pleaded that it was a navigable river, and also that it was an arm of the sea, wherein every subject had a right to fish. The plaintiff (without traversing these allegations) replied that this was part of the manor of Arlingham,

A and that Mrs. Yates was seised of that manor and prescribed for a several fishery there. Issue being joined thereon, a verdict was found for the plaintiff.

Ashurst, for the defendant, moving for the rule, said that though the fact was so found, yet the law was otherwise, viz., that everyone had a right to fish in a navigable river or in an arm of the sea. He cited *Lord Fitzwalter's Case* (1) (1 Mod. Rep. 105); *Warren* v. *Matthews* (2); and *Ward* v. *Creswell* (3), which recognised *Lord Fitzwalter's Case* (1).

Serjeant Nares, for the plaintiff, showing cause: It is not an arm of the sea where the sea flows and reflows, but a part of a manor. It is found to be in the manor of Arlingham, in the county of Gloucester. A place may be parcel of a manor if between the high and low water marks, though the sea flows and reflows upon it. So is *Constable's Case* (4), BRACTON, lib. 2, c. 12.

Ashurst, supporting the rule: An exclusive right cannot be maintained by the subject in a river that is an arm of the sea. The general right of fishing in an arm of the sea is common to all. The replication ought to have shown that this was a separate pool, but the plaintiff cannot maintain a general right in the river in exclusion of all other the King's subjects. In *Constable's Case* (4) the admiral had jurisdiction between the high and the low water mark. When the tide is in, the water cannot belong to a manor, and a fishing can only be exercised when the tide is in when there is water. In the *Royal Fishery of Banne Case* (5) in *Ireland*, it is said that the King has a right as high as the sea flows and reflows. An arm of the sea, where the tide flows and reflows, is the same as the sea itself: JUSTINIAN INST., lib. 1, c. 1, tit. 1. *Warren* v. *Matthews* (2) (6 Mod. Rep. 73); every subject of common right may fish with lawful nets, etc., in a navigable river as well as in the sea and the King's grant cannot bar them thereof. Per SIR JOHN HOLT, C.J. (1 Salk. 357): "The subject has a right to fish in all navigable rivers, as he has to fish in the sea." In case of a river that flows and reflows and is an arm of the sea, SIR MATTHEW HALE says: "The right of fishing is prima facie common to all": *Lord Fitzwalter's Case* (1).

LORD MANSFIELD, C.J.—The rule of law is uniform. In rivers not navigable the proprietors of the land have the right of fishery on their respective sides, and generally extends ad filum medium aquæ. But in navigable rivers the proprietors of the land on each side have it not. The fishery is common; it is prima facie in the King, and is public. If anyone claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him unless he can prove such a prescriptive right. Here, it is claimed and found. It is, therefore, consistent with all the cases that he may have an exclusive privilege of fishing, although it be an arm of the sea. Such a right shall not be presumed, but the contrary, prima facie. But it is capable of being proved, and must have been so in the present case.

YATES, J.—I was concerned in a case of this kind. Such a claim was made, but the claim failed because it there happened that such a right could not be proved. Therefore, it was in that case determined that the right of fishing was common. But such a right may be proved. By the law of England what is otherwise common may, by prescription, be appropriated. GROTIUS owns that navigable rivers may be appropriated. The cited cases prove only the distinction that navigable rivers or arms of the sea belong to the Crown; and not (like private rivers) to the landowners on each side. Therefore, the presumption lies the contrary way in the one case from what it does in the other. Here, indeed, it lies prima facie on the side of the King and the public, but it may, nevertheless, be appropriated by prescription. The *Royal Fishery of Banne Case* (5) is agreeable to this, and it is a very good case. It appears by it that the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea, and in the case of Abbotsbury there mentioned (Dav. Ir. at p. 57 a)

the court said: "It must be intended that the abbey had originally had a grant from the Crown." In *Lord Fitzwalter's Case* (1) (1 Mod. Rep. 105) SIR MATTHEW HALE says truly: "If anyone will appropriate a privilege to himself, the proof lieth on his side." If it may be granted, it may be prescribed for, a prescription implies a grant; but it cannot be presumed; it must be proved. Why, then, may not this plaintiff prescribe for an exclusive right of fishing in an arm of the sea, and prove this appropriation though the prima facie presumption is contrary?

ASTON, J., concurring, said: This is the true distinction; and *Lord Fitzwalter's Case* (1) is in point.

Rule discharged.

ALDRED'S CASE

[COURT OF KING'S BENCH, Michaelmas Term, 1610]

[Reported 9 Co. Rep. 57 b; 77 E.R. 816]

Easement—Air—Interference with right—Pollution by smoke and smell—Right to light—Prospect from property—Obstruction—Right of action—Pollution of water course.

Per Curiam: An action will lie by the owner of property for interference with his right to air or light, but no action will lie for the obstructing of a prospect "which is a matter of delight and not of necessity" and though "it is a great commendation of a house if it has a long and large prospect." An action will also lie for infecting and corrupting the air as by building a lime-kiln so near the property of the plaintiff that when it burns smoke enters the house "so that none can dwell there." Similarly the erection of a pig-sty so near the house of the plaintiff that the air is corrupted by the smell is actionable. Also for the pollution of a watercourse.

Notes. Considered: *Crowhurst* v. *Amersham Burial Board*, [1874–80] All E.R. Rep. 89; *Dalton* v. *Angus* (1881), 6 App. Cas. 740 ([1881–5] All E.R.Rep. 1); *Chastey* v. *Ackland* (1897), 13 T.L.R. 237; *Colls* v. *Home and Colonial Stores, Ltd.*, [1904–7] All E.R.Rep. 5. Referred to: *Jones* v. *Powell* (1629), Palm. 536; *Bradley* v. *Gill* (1688), 1 Lut. 69; *Rich* v. *Basterfield* (1847), 4 C.B. 783; *Simpson* v. *Savage* (1856), 1 C.B.N.S. 347 ([1843–60] All E.R.Rep. 748); *Bonomi* v. *Backhouse* (1858), E.B. & E. 622; *Webb* v. *Bird* (1861), 10 C.B.N.S. 268; *Bamford* v. *Turnley* (1862), 3 B. & S. 66 ([1861–73] All E.R.Rep. 706); *Tod-Heatly* v. *Benham* (1888), 40 Ch.D. 80; *Aldin* v. *Latimer, Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Warren* v. *Brown*, [1900] 2 Ch. 722; *Davis* v. *Town Properties Investment Corpn.* (1902), 71 L.J.Ch. 900 ([1900–3] All E.R.Rep. 558, C.A.); *Kine* v. *Jolly*, [1905] 1 Ch. 480; *Paine & Co.* v. *St. Neots Gas and Coke Co.*, [1939] 3 All E.R. 812.

As to easements of light and water, air, prospect, see 12 HALSBURY'S LAWS (3rd Edn.), 582–603, 611, 612, 614. For cases see 19 DIGEST (Repl.) 134 et seq., 190–192, 196, 197.

Case referred to:

(1) *Bland* v. *Moseley* (1587), cited in 9 Co. Rep. at p. 58 a; 1 Bulst. at pp. 115, 116; Hut. at p. 136; 77 E.R. 817; sub nom. *Mosley* v. *Ball*, Yelv. at p. 216; 19 Digest (Repl.) 190, *1299*.

Action on the case brought by the plaintiff, William Aldred, against the defendant, Thomas Benton.

A In 1609 the plaintiff was seised of a house and a parcel of land in length 31 feet and in breadth 2 feet and a half, next to the hall and parlour of the plaintiff of his house at Harleston in the county of Norfolk in fee. The defendant was possessed of a small orchard on the east part of the said parcel of land, and the plaintiff complained that on that piece of land he erected a pig-sty so near the house that the air thereof was corrupted. The defendant pleaded not guilty, and
B at the assizes in Norfolk he was found guilty of nuisance and damages were assessed. Now it was moved in arrest of judgment on the ground that the building of the house for hogs was necessary for the sustenance of man, and one ought not to have so delicate a nose that he could not bear the smell of hogs, for lex non favet delicatorum votis.

It was resolved, however, that the action was well maintainable, for in a house
C four things were desired habitatio hominis, delectatio inhabitantis, necessitas luminis, et salubritas aeris, and for nuisance done to three of them an action lay: (i) To the habitation of a man, for that is the principal end of a house. (ii) For hindrance of the light, for the ancient form of an action on the case was significant, sc. quod messuagium horrida tenebritate obscuratum fuit, therewith agree 7 Edw. 3, 50 B.; 22 Hen. 6, 14 [15 A.], by MARKHAM, 11 Hen. 4, 47.

D As to this there was a case adjudged in the King's Bench, in 1586 [*Bland* v. *Moseley* (1)]. James Bland brought an action on the case against Thomas Moseley and declared how that he (Bland) was seised in fee of an ancient house in Netherousegate, in the city of York, and that he and all those whose estate he had in the said house, from time whereof, etc., had and was used to have for them and their tenants, for life, years, and at will in the west side of the said house
E seven windows or lights against a piece of land containing half a rood adjoining to the said house, which piece of land from time whereof, etc., was without any building, until Sept. 28, 1585, and showed the length and breadth of the windows for all the time aforesaid, by force of which windows the said James, and all those whose estate he had in the said house from time whereof, etc., had used to have for them and their tenants aforesaid divers wholesome and necessary easements
F and commodities, by reason of the open air and light. On Sept. 20, 1585, the said James demised to the plaintiff the said house for 3 years, and the defendant, maliciously intending to deprive him of the said easements, et obscurare messuagium præd' horrida tenebritate etc. on Nov. 20, 1586, had erected a new building on the said piece of land, so near that the said seven windows were stopped, whereby the plaintiff lost the said easement, etc. Et maxima pars messuagii
G prædict' horrida tenebritate obscurata fuit, etc. In bar of which action the defendant pleaded, quod infra prædict' civitatem Ebor' talis habetur, et a toto tempore cujus contrarii memoria non existit, habebatur consuetudo, videlicet, quod si quis habuerit fenestras et visum per easdem versus terram vicini sui, vicinus ille visum illarum fenestrarum obstruere super terram illam solebat et posset, sicut melius viderit sibi expedire. By force of which custom he justified
H the stopping of the said windows.

On that the plaintiff demurred in law, and it was adjudged by SIR CHRISTOPHER WRAY, C.J., and the whole Court of King's Bench that the plea was insufficient in law to bar the plaintiff of his actions for two reasons: (i) When a man has a lawful easement or profit by prescription from time whereof, etc., another custom, which is also from time whereof, etc., cannot take it away, for the one custom is as ancient as
I the other, as if one has a way over the land of A. to his freehold by prescription from time whereof, etc., A. cannot allege a prescription or custom to stop the said way (ii) It may be that before time of memory the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning. WRAY, C.J., then said, that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said et vescitur aura ætherea, and the words horrida tenebritate, etc., are significant and imply the benefit of the light. But he said that for prospect, which is a matter only of

delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, unde dicitur, laudaturque domus longos qui prospicit agros. But the law does not give an action for such things of delight. And Solomon says (Ecclesiast. 11, 7): Dulce lumen est et delectabile oculis videre solem. Et olim (ut Plutarchus in Conv. 7. Sap. refert.) Rex Æthiopum interrogatus quid optimum? respondebat lucem; quis enim natura duce tenebras non exhorrescit? If the stopping of the wholesome air, etc., gives cause of action, a fortiori an action lies in the case at Bar for infecting and corrupting the air.

The building of a lime-kiln is good and profitable, but, if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use, and a glover sets up a lime-pit for calve skins and sheep skins so near the watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the house, an action on the case lies for it, as it is adjudged in Y.B. 13, Hen. 7, 26 B., and this stands with the rule of law and reason, Prohibetur ne quis faciat in suo quod nocere possit alieno: et sic utere tuo ut alienum non lædas. Vide in the Book of Entries, tit. Nuisance, 406 b, he who has a several piscary in a water shall have an action on the case against him who erects a dyehouse, ac fimos, fœditates, et alia sordida extra domum præd' decurrentia in piscariam præd' decurrere fecit, per quod idem proficium piscariae suæ præd' totaliter amisit, etc. There is another precedent against a dyer, etc., quod idem Henricus in mansione sua præd' ob metum infectionis per horridum fœtorem fumi, fœditatis, et aliorum sordidorum, etc., per magnum tempus morari non audebat.

So in the case at Bar, forasmuch as the declaration is that the defendant maliciously intending to deprive the plaintiff of the use and profit of his house, erected a swine sty tam prope aulam et conclave ipsius Willielmi, ac sues et porcos suos in ædificio illo posuit, et ill' ibid' per magnum tempus custodivit, ita quod fœtidi et insalubres odores sordidorum præd' suum et porcorum præd' Thomæ in aulam, etc., penetran' et influen', idem Willielmus ac famuli sui, etc., in messuag' prædict' conversantes existen' absque periculo infectionis in aulâ, etc., continuare seu remanere non potuerunt, prætextu cujus idem Will' totum commodum, etc., maximæ partis præd' messuag' per totum tempus præd' totaliter perdidit. To which declaration the defendant pleaded not guilty, but, he being found guilty of the matter in the declaration, it was adjudged that the plaintiff should recover.

Judgment for plaintiff.

A

MASON *v.* KEELING

[Court of King's Bench (Sir John Holt, C.J., Turton and Gould, JJ.), Michaelmas Term, 1700]

[Reported 1 Ld. Raym. 606; 12 Mod. Rep. 332; 91 E.R. 1305]

B *Animal—Dog—Liability of owner for injury to plaintiff—Need to prove dog fierce to owner's knowledge.*

An action will not lie against the owner of a domestic animal, e.g., a dog, for damage done by the animal unless it is proved that he had notice that the animal was fierce or mischievous. Proof of this scienter is essential to the maintenance of the action.

C **Notes.** Considered: *May* v. *Burdett*, [1843–60] All E.R.Rep. 136; *Cox* v. *Burbidge* (1863), 12 C.B.N.S. 430. Followed: *Sanders* v. *Teape*, [1881–5] All E.R.Rep. 1016; *Manton* v. *Brocklebank*, [1923] All E.R.Rep. 416. Applied: *Buckle* v. *Holmes*, [1925] All E.R.Rep. 676. Considered: *Hines* v. *Tousley* (1926), 95 L.J.K.B. 773; *Searle* v. *Wallbank*, [1947] 1 All E.R. 12. Referred to: *Read* v. D *Edward* (1864), 17 C.B.N.S. 245; *Knott* v. *L.C.C.*, [1933] All E.R.Rep. 172; *McQuaker* v. *Goddard* [1940] 1 All E.R. 471; *Brock* v. *Richards*, [1951] 1 K.B. 529; *Wormald* v. *Cole*, (1954) 1 All E.R. 683; *Rands* v. *McNeil* [1954] 3 All E.R. 593.

As to the liability of owners for injuries caused by animals, see 1 Halsbury's Laws (3rd Edn.) 663–668. For cases see 2 Digest (Repl.) 309 et seq., 378–389.

E Cases referred to:

(1) *Michell* v. *Allestry* (1676), 3 Keb. 650; sub nom. *Michael* v. *Alestree*, 2 Lev. 172; sub nom. *Anon.*, 1 Vent. 295; 2 Digest (Repl.) 331, *226.*

(2) *Weaver* v. *Ward* (1616), Hob. 134; 80 E.R. 284; 46 Digest (Repl.) 352, *4.*

(3) *Kinnion* v. *Davies* (1637), Cro. Car. 487; 79 E.R. 1021; 2 Digest (Repl.) 382, *561.*

F (4) *Cropper* v. *Matthews* (1659), 2 Sid. 127; 82 E.R. 1293; 2 Digest (Repl.) 382, *565.*

(5) *Ireland* v. *Higgins* (1588), Cro. Eliz. 125; Het. 50; Owen, 93; 78 E.R. 383; 2 Digest (Repl.) 372, *492.*

(6) *Wright* v. *Ramscot* (*Rainscar*) (1667), 1 Saund. 84; 1 Sid. 336; 85 E.R. 93; sub nom. *Wright* v. *Wranscot* (*Wrainscott*), 2 Keb. 237; 1 Lev. 216; G 2 Digest (Repl.) 373, *504.*

(7) *Boulton* v. *Banks* (1632), Cro. Car. 254; 79 E.R. 822; 2 Digest (Repl.) 301, *91.*

(8) *Mitten* v. *Faudrye* (1626), Poph. 161; sub nom. *Millen* (*Miller*) v. *Fawen* (*Fawtrey*, *Fawdry*, *Hawery*), Benl. 171; W.Jo. 131; Lat. 13, 119; 2 Digest (Repl.) 374, *515.*

H **Action on the Case** in which the plaintiff declared against the defendant, alleging that the defendant's dog, while on the highway, had bitten him. The defendant demurred.

The exception taken to this declaration by the defendant's counsel was that the plaintiff had not shown that the defendant knew that the dog was valde ferox, without which knowledge he would not be answerable for any injury that the I dog of a sudden and unknown to the defendant did to the plaintiff. It was argued three times by *Northey*, *Darnall* (King's Serjeant), and *Peere Williams*, for the plaintiff, and by *Boult*, *Sir Bartholomew Shower*, and *Raymond*, for the defendant.

Counsel argued for the plaintiff that, though in such actions as this, it had been held necessary in many cases to say sciens in the declaration, yet where the fact had such circumstances as this had, the omitting of sciens would not vitiate the declaration. In this case the dog was shown to be valde ferox, and to permit such a dog to go at large on the highway was a common nuisance for which whosoever received any particular prejudice or damage had an action. A coachman driving

a young pair of horses in Lincoln's Inn Fields to use them to the coach, the horses ran away with the coach, threw the coachman out of his box, and ran over a man. For this an action was adjudged maintainable, because everyone ought to take care that his tame cattle do no injury to anybody, and if they do, he shall be compelled to make reparation for the injury sustained: *Anon.* (1). In that case (1 Vent. 295) another case was cited where an action was brought against a butcher after an ox had run out of the stall, and gored the plaintiff, and it was laid in default of keeping the ox tied up. Also the case of a monkey which bit a child, and an action was brought against the owner for it. In the same case a distinction was taken that, if a fox breaks his chain, runs away, and does any mischief, and does not return to the owner, no action will lie against the owner because, it seems, that the fox was returned to his wild nature, but otherwise if the fox returns to his owner. The present case was likened to the case where a coachman leaves his coach and horses in the street and they do any mischief, for which neglect an action lies against him, for a man shall be answerable for all mischief proceeding from his neglect or his actions unless they were of unavoidable necessity: *Weaver* v. *Ward* (2); T.Jo. 235.

Against this it was argued by the defendant's counsel that a man shall not be answerable for any bite or other injury done by his dog unless he had notice of such a thing done by him before. For this they cited Reg. 111; 1 DYER, 25, pl. 162; FITZ. CORON. 311; *Kinnion* v. *Davies* (3); 1 ROLL. ABR. 4; *Cropper* v. *Matthews* (4). There it is held that scienter at least ought to be in such case shown in the declaration, and ought to be proved upon the evidence. For the same reason, if there is nothing to distinguish this case from the said cases but the word "ferox," which imports fierceness of nature, the plaintiff should have shown that the defendant had notice of this fierce quality, for as in the one case he shall not be answerable for the biting of his dog without having notice that he had used so to do, so in the other case he shall not be answerable without knowing that he was of a fierce quality. Without which knowledge the law permits any man to keep them as domestic animals, and does not require such guard to be set over them as other animals which are not so familiar to human kind and consequently may be supposed to be more easily irritated to do mischief. As to the objection that this dog was a mastiff, and as a consequence the defendant must have known that he was of a fierce nature, it was answered that this dog is laid to be a mongrel mastiff, and the law does not take notice of any such sort of dog. *Ireland* v. *Higgins* (5) and *Wright* v. *Ramscot* (6), where the sorts of dogs are enumerated (but no mention made of a mongrel mastiff) of which the law takes notice. Further, admitting a mastiff to be fierce, this mongrel might degenerate from the fierceness and nobleness of the nature of the mastiff by the mixture of the species. Besides that, in the case of a mastiff sciens ought to be in the declaration, as in *Boulton* v. *Banks* (7).

As to the objection that this was on the highway, and, therefore, the defendant ought to give satisfaction for the injury done by his dog because he ought not to permit the dog to go at large there, it was answered that it did not appear that it was on the highway, for it was only said "in communi platea." It was not said that the subjects usually resort there or pass through it. It must be granted that a man may be indicted for a nuisance erected in communi platea, but that must be as done on the highway, and the indictment ought to be so and not "in communi platea," for the law takes no notice of platea which signifies nothing but a wide place and oftentimes a courtyard. It may be, for anything that appears to the contrary, that this was in the defendant's yard, and then it can never be likened to the case of nuisances. As to *Anon.* (1), the declaration implied a sufficient notice, for the coachman was breaking in unruly horses in a place where there was a great concourse of people, and, therefore, it was not like the present case.

SIR JOHN HOLT, C.J., and **TURTON, J.**: The declaration is ill for want of showing that the defendant had notice that the dog was fierce. There is a great

A difference between horses and oxen, in which a man has a valuable property and which are not so familiar to mankind, and dogs. The former the owner ought to confine, and take all reasonable caution that they do no mischief, otherwise an action will lie against him, but otherwise of dogs before he has notice of some mischievous quality. In the former case if the owner puts a horse or an ox to grass in his field which is adjoining to the highway, and the horse or the ox breaks the B hedge, runs into the highway, and kicks or gores some passenger, an action will not lie against the owner. Otherwise if he had notice that they had done such a thing before. For anything that appears to the contrary, the defendant might not have had this dog but one day or two before and did not know of this fierce nature, and then the dog, because the door was left open, ran out, and bit the plaintiff. If so, it will be very hard to subject the defendant to an action for it. C Otherwise, if the defendant had known before that this dog was of such a fierce nature, for he ought to have kept him at his peril.

Per **SIR JOHN HOLT, C.J.:** If A. has a dog used to bite, and he knows it, and he gives it to B., B. being cognisant of this quality, if the dog bites, an action will lie against B. Otherwise, if B. had not been cognisant of this quality. The D law does not oblige the owner to keep the dog in his house, for if the dog break a neighbour's close, the owner will not be subject to an action for it: *Mitten* v. *Faudrye* (8). But if a servant leaves open the stable door and a coach-horse runs out and does mischief, it is otherwise.

GOULD, J., however, was of opinion that the declaration was good because the averring that the dog was fierce made the owner liable to an action for an injury E done by such a dog because he did not keep him in a safe place.

*The parties agreed between themselves, and each of them bore the loss of what each had expended. Therefore, no judgment was given.**

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* In 12 Mod. Rep. 336, the court is represented to have given judgment for the defendant.

EDGE *v.* SALISBURY AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Hardwicke, L.C.), April 24, 1749]

[Reported Amb. 70; 27 E.R. 42]

Will—Relations—"Nearest relations"—Relations who would take under Statute of Distribution.

By his will the testator gave £2,000 "to and among such of my nearest relations as my executors shall think the greatest objects of charity."

Held: the words did not extend further than to the nearest relations, such as would take under the Statute of Distribution, 1670.

Will—Evidence—Proof that certain persons intended to benefit.

Parol evidence to show a testator's intention excluded where the meaning of the words of the will were considered to be clear, but admitted to prove that certain persons might come within a class intended to be benefited.

Notes. The present provisions relating to the distribution of residuary estate are to be found in Part 4 of the Administration of Estates Act, 1925 (by Sched. 2 of which Act the Statute of Distribution, 1670, was repealed) as amended by the Intestates' Estates Act, 1952: see 9 HALSBURY'S STATUTES (2nd Edn.) 718, and vol. 32, p. 115.

Referred to: *Smith* v. *Campbell* (1815), Coop.G. 275; *Brandon* v. *Brandon* (1819), 3 Swan. 312; *Re Scarisbrick's Will Trusts, Cockshott* v. *Public Trustee*, [1951] 1 All E.R. 822.

As to the admission of parol evidence in construing a will, see 39 HALSBURY'S LAWS (3rd Edn.) 955 et seq., and as to the meaning of "relations" in a will, see ibid., pp. 1069, 1070. For cases see 48 DIGEST (Repl.) 481 et seq.; 49 DIGEST (Repl.) 809.

Case referred to:

(1) *A.-G.* v. *Buckland* (1741), cited in Amb. at p. 71; 27 E.R. 42, L.C.; 49 Digest (Repl.) 806, *7583*.

Bill filed by the plaintiffs who alleged that they were beneficiaries under a will.

Samuel Edge by his will devised £2,000 in the manner following:

"I give and bequeath unto, and I hereby order and direct my executors to pay out of the residue and rest of my estate, the sum of £2,000 to and amongst such of my nearest relations of the family of Edge as my executors shall think the greatest objects of charity, in such manner and in such proportions as my executors and the survivors and survivor of them shall think fit, and I do hereby desire that my executors would take the advice and direction of my sister Salisbury in the distribution thereof."

The bill was filed by the plaintiffs as first cousins of the testator and proper objects of the testator's charity against the defendants, who were his nephews and nieces, to be paid their proportion of the £2,000.

Wragg, for the plaintiffs, cited *A.-G.* v. *Buckland* (1), before LORD HARDWICKE, who said that where a gift is given to relations it is to be confined to the next-of-kin, but where it is given to poor relations, the construction has been more large and extended to those that were of kin and objects of charity.

LORD HARDWICKE, L.C.—I will not construe the intention to extend further than to the nearest relations, such as would take under the Statute of Distribution. Otherwise it would be endless to find out everybody that were relations.

The plaintiffs attempted to read evidence that the testator meant to comprehend them, but HIS LORDSHIP refused it, because, he said, it would be to construe words which of themselves carry a meaning. Parol evidence was admitted to prove that the testator, in conversation with the defendant Salisbury, was informed that the

plaintiffs were his relations. His Lordship said that it had been received in the case of an uncertain description of the person, as by a wrong name, to show that the person intended to be described by the testator was known to him by such a nickname.

Bill dismissed.

VASPOR *v.* EDWARDS

[Court of King's Bench (Sir John Holt, C.J., Gould, Powis and Turton, JJ.), Hilary Term, 1701]

[Reported Holt, K.B. 256; 1 Ld. Raym. 719; 12 Mod. Rep. 658; 1 Salk. 248; 11 Mod. Rep. 21; 90 E.R. 1040]

Animal—Distress damage feasant—Damage for which animal distrainable—Limits of right to distrain—Impounding—Common pound.

An animal is distrainable damage feasant only for the damage it does and if taken in the act. If ten head of cattle are doing damage the owner of the land on which they are trespassing cannot take one of them and keep it till he be satisfied for the whole damage. An animal cannot be followed and brought back if once it goes off the land. If an animal trespasses twice it cannot be distrained the second time for the damage done on the first occasion. So long as the animal is detained the landowner has no action for the trespass.

Per Sir John Holt, C.J.: It makes no difference if the animal is impounded in a common pound, for be the pound common or not it is the pound of him who uses it for that time. The law does not require a man to put the distress in a common pound, but only that it be put in a pound overt, or be fed at peril of the distrainer and taken care of by him. If there be a common pound and one will use it he must take care to keep it.

Notes. Considered: *Knowles* v. *Blake* (1829), 5 Bing. 499. Applied: *Williams* v. *Price* (1832), 3 B. & Ad. 695. Considered: *Lehain* v. *Philpott* (1875), L.R. 10 Exch. 242. Referred to: *R.* v. *Cotton* (1751), Park. 112; *Lees* v. *Wright* (1822), 1 Dow. & Ry.K.B. 391; *Roscoe* v. *Roden* (1894), 38 Sol. Jo. 291.

As to distress damage feasant, see 1 Halsbury's Laws (3rd Edn.) 673–680. For cases see 18 Digest (Repl.) 433 et seq.

Cases referred to:

(1) *Anon.* (1568), 3 Dyer, 280 a, pl. 14; 73 E.R. 628; 18 Digest (Repl.) 349, *970.*

(2) *Foster* v. *Jackson* (1615), Hob. 52; 80 E.R. 201; 18 Digest (Repl.) 248, *3.*

(3) *Sutcliffe* v. *Constable* (1612), Yelv. 223.

(4) *Bagshawe* v. *Goward* (1607), Cro. Jac. 147; Yelv. 96; Noy, 119; 79 E.R. 129; 18 Digest (Repl.) 445, *1893.*

(5) *Duncomb* v. *Reeve and Green* (1600), Cro. Eliz. 783; 78 E.R. 1013; 18 Digest (Repl.) 331, *773.*

(6) *Sir Rowland Heyward's Case* (1595), 2 Co. Rep. 35 a; 76 E.R. 489.

(7) *Earl of Shrewsbury's Case* (1610), 9 Co. Rep. 46 b; 77 E.R. 793.

Trespass quare clausum fregit.

The plaintiff alleged that a pig belonging to the defendant trespassed on his land and fed on the grass. The defendant as to all, except the trespass by the pig, pleaded not guilty, and, as to that, that the plaintiff ought not to have his action for he had taken the pig doing the damage and impounded and detained it in a common pound. The plaintiff confessed the taking and impounding, but said that

afterwards the pig, without his consent and will, did escape out of the pound. To this the defendant demurred, and the plaintiff replied.

It was said, to maintain the replication, that a distress is but a pledge, and, if one be defeated of his pledge and has no remedy over, he shall have recourse to his original remedy for the thing for which the pledge was taken. If one bails goods as a pledge for money and the bailee be robbed of them, he shall maintain an action for the money. Here is no default in the plaintiff, for he could do no more than to impound the pig, and he could not justify the tying of it, so as to secure it from escaping. The whole default is in the defendant: (i) in doing wrong to the plaintiff, and (ii) by not tendering amends whereupon he might have his hog again: vide 2 INST. 341. If the plaintiff is defeated of his distress through the fault of the defendant he may distrain de novo, as if a distress die in the pound overt for want of food, the distrainer may distrain de novo: vide 3 DYER, 280 b [*Anon.* (1)]; HOB. 61 [*Foster* v. *Jackson* (2)]; 15 Edw. 4, 10. Ergo, he may also bring trespass if he please. If debt he brought for rent issuing out of land in the same county, levied per distress without more will not be a good plea, but he must also make a special conclusion et sic riens arriere, so that the taking the distress and detaining thereof is not the material matter, but the rent not being behind is.

To this it was said that in this case the plaintiff had his choice to distrain or bring trespass; and when he has made his election and taken a distress he shall never have recourse to any other remedy till that remedy proves ineffectual through the act of God, or the wrong of the defendant, neither of which has happened here. Therefore, the case of the distress dying in the pound for want of food—that is, in a pound overt—or dying in any pound by any other chance without default of the distrainer, is not like this. If the defendant had brought a replevin here, the sheriff must have returned an elongatur, and could not return the escape: vide 5 Hen. 7 [fo. 10]; but he may return that they escaped, and came back to the owner: vide Br. tit. Return, 75. Here it does not appear that the pig came back to the defendant, which shows that the plaintiff is not discharged of it nor is the defendant chargeable for the trespass for which he is supposed to have a distress, and for which, if a replevin were brought and an elongatur had been returned, as it ought to be, a withernam [a writ directing the sheriff to take cattle of the defendant, to the value of those taken by him, and deliver them to the plaintiff] would go against the plaintiff of his own cattle. If this had been a case of rent, levied per distress would be a good plea, for the meaning of that plea is not that the money is actually paid, for then nihil debet or riens arriere had been the proper plea; the meaning of it is, that the party has taken a distress and still has it as a gage [i.e., surety or pledge] for his rent. It was said that the escape here was through the default of the distrainer, for he might have put the distress in a safe pound, which, if it were broke, he had a remedy by a parco fracto [a writ for damages caused by a pound-breach], or, if this be the common pound and not capable of holding the distress, it was his folly to make use of it when he might put it into any other safe place and make that his pound. Or, perhaps, he may have remedy against the lord for not maintaining a sufficient pound so that still he is at no prejudice, or at least it is such a one as comes through his own default, and then he may thank himself for it. It was also denied that the distrainer could not tie the distress, but it was agreed it will be at his peril if through such tying the distress comes to any hurt, for then he must answer for it. The distress must be in a convenient pound, and, if it be not such and a distress is put into it and abused, though it be what is called a common pound, the distrainer shall answer for it. Therefore, if a live beast be put into a place in which there are sharp spikes, by which the beast is stuck, though it be a public pound, the distrainer shall answer for it, for it is his pound, and it is he who shall have a parco fracto for the breach of it and not the lord; vide DOCTOR AND STUDENT, c. 27. It was said that there were but two sorts of pounds, viz., overt and covert—overt where the owner may come and feed his cattle without being a trespasser, and covert where he cannot have such access. If the cattle die in a pound overt for

A want of fodder or without any default in either party, the loss is the owner's, which shows that, if they die through any default of the distrainer, as for want of food in a pound covert, it is at his peril. So of other defaults, as may be reasonably collected from the said book of DOCTOR AND STUDENT, ubi supra. It was said that a pound was not like a common gaol, or a hayward like a gaoler, but only a common servant to all that used the pound.

B **SIR JOHN HOLT, C.J.,** strongly inclined to all this. He added this diversity between rent and damage feasant, for one may distrain any cattle he finds on the premises for rent, but in the other case they must be actually doing damage and are only distrainable for the damage they are then doing, and continuing. If they have done damage today and gone off, and come again at another time, are doing C damage, and are taken for that, and the owner tenders amends for that damage, the party cannot justify keeping them for the first damage. If ten head of cattle are doing damage, one cannot take one of them and keep it till he be satisfied for the whole damage, but may bring trespass for the rest. If distress be stolen or set at large by a stranger, he shall not be answerable for it, but even in that case, if replevin be brought and an elongatur returned, as it must be, there shall be a D withernam, and the distrainer liable till he show that matter which, being no default of his, will execute him. The plaintiff in replevin may work beasts taken in withernam, because they are delivered to him in lieu of his own, and when the matter is determined, if it goes for the plaintiff in replevin, he shall have judgment for the beasts in withernam, if his own be not to be had, but if it be for the defendant he shall have his beasts again and may keep the distress till he be E satisfied. When one distrains damage feasant, he has an adequate satisfaction for his damage till he lose it without default in himself, for when he has return irreplevisable, he can have no other satisfaction but to keep the distress till he be satisfied. Damage-feasant is the strictest distress that is, for the thing distrained must be taken in the very act; if they are once off, though on fresh pursuit, you cannot distrain them. If tender be made of damages before the taking, F the taking is unlawful; if after the taking and before impounding, then the detainer after is unlawful; but tender comes too late after the impounding to make either the taking or detaining unlawful. Still, after the impounding the distrainer may take the amends and let go the distress, if he please. If a beast has done more damage than he is worth, let the landowner not distrain, but rather take his action.

G In Hilary Term, 1701, the court gave judgment as follows:

GOULD, J.—The plea in bar is bad, and the replication good. If the distress had died in pound, though after judgment irreplevisable, he might distrain anew, or bring his action; for it is, as HOBART says, the effect of the agreement of the parties, or act in law: HOB. 61 [*Anon.* (1)]; 15 Edw. 4, 10; DOCTOR AND STUDENT, H c. 27. The party has the goods as a pledge, and as long as that continues he shall not have any other remedy, but once it ceases to be a pledge, his action is restored to him, and it is in his election whether he will retake his distress or bring his action of trespass. If the owner breaks the pound and lets the distress go, the distrainer shall have a parco fracto or may retake the distress: In INST. 45; 34 Hen. 6, 18. If one distrains, and, as he is driving to pound, the distress escapes, I I may pursue and retake it, or bring trespass, and the reason is the same here. If the distress escapes out of pound, the party may retake him; 27 AFF., pl. 64, but he cannot tie, for that would be a misuser and would amount to a conversion. If the distrainant suffer the distress to escape by his own consent, he discharges the trespass. If the defendant had alleged any default in him, that perhaps would alter the case. [HIS LORDSHIP concluded that the replication was good.] The plea is bad. It is that nomine districtionis he took and impounded, but that is not enough, for he should have said further that he still does detain the distress. If a feire facias be brought upon a judgment and the defendant pleads that he

has been taken in execution, that will not be enough without saying further that he still continues in execution: RAST. ENT. 175. Where a distress for rent is so pleaded and shown to continue, so here as long as it is shown that the plaintiff has a gage or pledge, so long it is a bar, but the minute that gage ceases against the party's will, the action revives. In all cases where one pleads a plea, which to be good must be continued, there he must show how the continuance: as 12 Hen. 8, 2; 13 Hen. 8, 15; as if a man makes title under a tenant for life, he must aver his life: *Sutcliffe* v. *Constable* (3). [HIS LORDSHIP held the return in replevin in this case might be made of the special matter as well as if the distress had died in pound or escaped and came back to the owner, which may well be done: vide BR. RETURN OF WRITS, 125; DALT. RET. BREV., 104.

POWIS, J.—It would be of dangerous consequence if cattle taken damage feasant should escape out of pound without default of him who did distrain and that he thereby should become remediless, for a distress, whether for rent or damage, is but a gage, *Bagshawe* v. *Goward* (4) (Cro. Jac. at p. 148), and the distress could not be sold at common law even in the case of rent nor now for damage feasant. The distrainer cannot use them though it be for their good, and, therefore, he cannot tan green hides to preserve them: *Duncomb* v. *Reeve and Green* (5); nor milch cows to preserve their milk or save them from hurt, 1 ROLL. ABR. 673, though it be allowed, *Bagshawe* v. *Goward* (4), that kine may be milked to prevent their being spoiled. I take ROLLE to be law. Then, if it be a gage, it is a gage for satisfaction, and, if that be never made, why shall the party have no remedy if there be no default in him? For it is as true a rule that one shall be satisfied once as that he shall not be satisfied twice. If cattle distrained be put in pound overt, the owner at his peril must feed them, and, if they die, the distrainer shall bring his action or distrain again: *Anon.* (1); 1 INST. 47, DOCTOR AND STUDENT 102. The reason of that is because he lost his pledge without fault in him. Another reason why he ought not to lose his remedy is because he cannot otherwise secure them than by impounding, for he cannot tie them: vide 27 Ass., ubi sup. So if they be stolen out of the pound overt he is not liable nor remediless, but if he should put things into the pound overt which are not proper to be put there and they be stole, he shall answer for them. If, however, they be proper for pound overt, the owner must keep them from thieves, as from starving: 1 INST. 47 b. If distress be stole out of pound, and elongat be returned, the distrainer to prevent a withernam may show that they were stolen: 32 Hen. 6, 27 B.; BR. RET. BREV. 135; FITZHERBERT'S NATURA BREVIUM 74; and some books say the sheriff may return it. If the cattle die in pound, he may distrain in case of rent or bring debt; ergo, if they die in case of damage feasant he may bring trespass: 15 Edw. 4, 10; *Anon.* (1); *Foster* v. *Jackson* (2) (Hob. 61); DOCTOR AND STUDENT, c. 27, f. 112. Notwithstanding all this the action will not lie here for want of this material word in the replication, that the distress escaped without the plaintiff's default, for it is not enough his gage should be lost without his consent, it must be without his default, too, to entitle him to an action. HIS LORDSHIP held the plea good, though the words "adhuc detinet" were wanting, for it is a plea in bar and good to a common intent.

TURTON, J.—The plea is good. The plaintiff had his election of two remedies, trespass or distress, and using of one is an utter waiver of the other: *Sir Rowland Heyward's Case* (6); *Earl of Shrewsbury's Case* (7) (9 Co. Rep. 51); and *Foster* v. *Jackson* (2) (Hob. at p. 59). An election of one is an implied rejection of the other. Distress sufficient to satisfy the rent is a good plea in bar to debt for the rent, so by parity of reason in trespass. [HIS LORDSHIP concurred with POWIS, J., that the replication was bad for the cause above, and here was defect in the plaintiff to put the distress into such a pound, when he might put it into a safer as everybody must know he might have done, for a common pound of a manor cannot be looked upon safe for a pig, and so he concluded against the plaintiff.]

SIR JOHN HOLT, C.J.—I always was of the opinion that now I am of, that judgment ought to be for the defendant, for it is plain there was a time when the plaintiff could not have maintained this action, viz., when the distress was taken. Then the defendant has pleaded this matter, which did take away the action, and so a matter is pleaded which shows the plaintiff had not an original cause of action. If the plaintiff will admit the truth of that matter, he ought to show some special subsequent matter whereby he is now become entitled to that action whereof he was originally ousted by the plaintiff's plea, or remove the matter that is made a bar to him. Here the taking the hog damage feasant is prima facie a bar of the action, and it is agreed that if distress is taken damage feasant, as long as it is detained it is a good bar in trespass.

It is objected that it is not shown that the hog is detained still, but surely a bar is good to a common intent, and it is enough for him that is distrained to show a distress taken. It behoves the other side to show how the possession of it happened to be lost, and since he has lost possession he knows best how. If he had shown that the defendant had taken it out of pound, it might be somewhat, or even that it escaped out of pound and ran home to the defendant, and that he (the plaintiff) came upon fresh pursuit to take it, and had been hindered by the defendant. Surely it is the default of the plaintiff that he put it in an ill pound; surely none will say that if a hog be put into such a pound as cannot keep it and then it escapes, that the distrainor can afterwards bring trespass. It being a common pound makes not to the case, for be the pound common or not it is the pound of him that uses it for that time, and the law does not require a man to put the distress in a common pound, but only that it be put in a pound overt, or be fed at peril of the distrainer and taken care of by him. Common pounds are either by custom, tenure, or agreement among the inhabitants of a vill or manor, and not by common law. If there be a common pound and one will use it, he must take care to keep it, and if it be broke he shall have a parco fracto though it be another man's pound as in another man's close; which shows it to be the pound of him that uses it as such. He ought to keep his pound, or, if it be out of repair and he put cattle in it and they escape, is it reasonable he should take advantage of his neglect? Surely it is not, for the distress is for his benefit, and the law appoints none else to take care of it. Though some pounds have haywards, who are officers in leets, yet the law takes not any notice of them.

To say that the defendant does not show in the bar that the plaintiff does detain it yet, it may be he does not detain it, for suppose it be replevied, the plaintiff's way would be to avow and pray return for the damage. If pending the matter upon the replevin this action were brought, would you have it set forth in pleading this matter that he still retains the hog? That would be false in fact, so the plea, prima facie, is good till it be avoided, as levied per distresse et sic nihil debet. Though the precedent in RASTALL be et adhuc detinet, yet that is no matter triable, but the taking the distress is what is triable. So it was there, for if a man distrains for rent or damage feasant upon replevin he must justify the taking and not the detainer; then, if upon the avowry it appears that he had good cause, he shall have return; if the distress be eloigned or embezzled, there shall go a withernam upon that matter returned on the returno habendo. So if there might be a replevin whereby the plaintiff would be dispossessed of the distress till return, that would discharge the action. When it is pleaded that he distrained the cattle, it shall be intended that he has them still, or that there is a replevin pending. If it be otherwise, it ought to come of the other side, for, if the distress be taken from him by replevin, as it well might be, that will not revive the action of trespass. If it escaped through his own defect or neglect, that will not revive the action.

Here the plaintiff once had the distress in his possession, and is best able to give an account of what is become of it, and if he does not show that he has lost it by some means whereby the action is revived, it shall be intended to continue discharged. It does not appear how the escape was, but only that it was without

the consent and will of the plaintiff. All that might be so and yet be through his neglect, and, if so, the action would not be revived. Suppose the door of the pound had not been locked, whose fault is it? Is it not the fault of the plaintiff, who ought to have shut it? So the defendant has shown a distress, which is prima facie a discharge of an action of trespass. Then the plaintiff ought to show how it came to be revived. If cattle die in pound, it is true the action is revived. Why? Because it is the act of God. Surely, then, there is a great difference between the death of the distress in the pound without the default of the distrainer and an escape of them, which must happen through his default and be taken so till he shows the contrary. The difference between an escape of a distress out of pound through neglect or other default of the distrainer and without his default is so material that in one case the action of trespass, etc., shall be revived, and in the other not. I always heard a bar was good to common intent, because it is to excuse from a charge, but a replication must have a general certainty because it is to destroy the excuse of the defendant, which is always received favourably.

Judgment for defendant.

PENNANT'S CASE

[Court of Queen's Bench, Trinity Term 1596]

[Reported 3 Co. Rep. 64 a; Moore, K.B. 456; Cro. Eliz. 553, 572; 76 E.R. 775]

Landlord and Tenant—Lease—Forfeiture—Waiver—Notice of breach—Acceptance of rent—Distress—Condition that on breach thereof lease void ipso facto. Where a lease contains a proviso for re-entry—e.g., if the lessee assigns the lease or any part of the term without the consent of the landlord or becomes in arrear with the rent—and an event entitling the landlord to re-enter occurs, the landlord can take advantage of his right of forfeiture and avoid the lease. If the landlord, with notice of the conduct of the lessee, accepts or distrains for rent accrued due since the cause of the forfeiture, he waives the forfeiture and affirms the lease. Where, however, there is a condition on the breach of which the lease shall be void ipso facto without any re-entry no acceptance of rent after the breach of the condition will make the void lease good.

Notes. Considered: *Matthews* v. *Smallwood*, [1908–10] All E.R.Rep. 538. Referred to: *Marche* v. *Curtes* (1596), 2 And. 90; *Fraunces's Case* (1609), 8 Co. Rep. 89 b; *Pamer* v. *Stabick* (1661), 1 Sid. 44; *Croft* v. *Lumley* (1858), 6 H.L.Cas. 672; *Dendy* v. *Nicholl* (1858) 4 C.B.N.S. 376; *Davenport* v. *Reginam*, [1874–80] All E.R.Rep. 157; *Hartell* v. *Blackler*, [1920] 2 K.B. 161.

As to forfeiture of a tenancy, see 23 Halsbury's Laws (3rd Edn.) 665–683. For cases see 31 Digest (Repl.) 512 et seq., 555 et seq.

Cases referred to:

(1) *Browning* v. *Beston* (1555), 1 Plowd. 133; 75 E.R. 202; 31 Digest (Repl.) 241, *3751*.

(2) *March* v. *Curtis* (1597), Noy, 7; 2 And. 90; 123 E.R. 561; sub nom. *Marsh* v. *Curteys*, Cro. Eliz. 528; 2 And. 42; 1 Brownl. 78; Moore, K.B. 425; 31 Digest (Repl.) 558, *6781*.

(3) *Morton* v. *Hopkins* (1568), 3 Dyer 271 a; Moore, K.B. 87; 73 E.R. 603; 31 Digest (Repl.) 282, *4166*.

Ejectione Firmæ between Harvy, plaintiff, and Oswald, defendant, on a demise

made in 1594 by John Pennant to the plaintiff of certain land in Ardeley, in the county of Essex, for three years, from the feast of All Saints, 1594.

The defendant pleaded that John Pennant was seised of the land in fee, and in 1592 demised it to the defendant for ten years yielding the yearly rent of £33 10s. at the feast of St. Michael, and the Annunciation of our Lady, and that he was possessed till Pennant ousted him, and demised to the plaintiff. The plaintiff replied and confessed the said lease, but further said that it was on condition that, if the defendant, his executors or administrators at any time without the assent of John Pennant, his heirs or assigns, did grant, alienate, or assign the land or any part thereof, then it should be lawful for Pennant and his heirs to re-enter and that in 1592 the defendant granted to one Taylor parcel of the land for six years without the assent of Pennant, for which he re-entered, and made the lease to the plaintiff.

The defendant, by way of rejoinder, said that before the re-entry Pennant accepted the rent due at the fast of the Annunciation of our Lady, after the assignment by the hands of the defendant Walter Oswald. To which the plaintiff, by way of surrejoinder said that Pennant before the receipt of the rent had no notice of the demise to Taylor, on which plea the defendant did demur in law, and it was adjudged for the plaintiff.

SIR EDWARD COKE, in his report, said that the following points were resolved:

(1) That the condition being collateral, the breach of it might be so secretly contrived as to be impossible for the lessor to come to the knowledge of it, and, therefore, notice in this case is material and issuable, for otherwise the lessee would take advantage of his own fraud, for he might make the grant or demise so secretly and so near the day on which the rent is to be paid, as to be impossible for the lessor to have notice of it, but if a man makes a lease for years, rendering rent on condition that, if the rent be behind, it shall be lawful for him to re-enter, in that case, if the lessor demands the rent and it is not paid, and afterwards he accepts the rent (before the re-entry made) at a day after, he has dispensed with the condition, for there the condition being annexed to the rent, and he having made a demand for the rent he well knew that the condition was broken, but, although in such a case he accepts the rent (due at the day for which the demand was made) yet he may re-enter, for as well before as after his re-entry he may have an action of debt for the rent on the contract between the lessor and lessee, and that was the first difference between a collateral condition and a condition annexed to rent.

(2) The second difference was that in case of a condition annexed to rent, if the lessor distrains for the same rent for which the demand was made, he has thereby also affirmed the lease for his distress for the rent received, for after the lease determined he cannot distrain for the rent.

(3) The third was that as well in case of a condition annexed to rent as in case of a condition annexed to any collateral act, if the conclusion of the condition be that then the lease for years shall be void, there, no acceptance of rent due at any day after the breach of the condition will make the void lease good. So a difference between a lease which is ipso facto void without any re-entry and a lease which is voidable by re-entry, for a lease which is ipso facto void by the breach of the condition cannot be made good by any acceptance afterwards: *Browning* v. *Beston* (1) (1 Plowd. at p. 133).

(4) The fourth was as the affirmation of a voidable lease by parol for money (or other consideration) will not avail the lessee, so the acceptance of a rent which is not in esse nor due to him who accepts it will not bind him, as if land be given to husband and wife and to the heirs of the body of the husband, the husband makes a lease for forty years and dies, the issue in tail accepts the rent in the life of the wife, and afterwards the wife dies, yet the issue shall avoid the lease, for at the time of the acceptance no rent was in esse, or due to him. Vide 32 Hen. 8, Br. Acceptance.

(5) The fifth was between a lease for life and a lease for years, for in the case

of a lease for life, if the conclusion of a condition annexed to the rent (or other collateral act) be, that then the lease shall be void, there (because an estate of freehold created by livery, cannot be determined before entry) in such case acceptance of rent due at a day after shall bar the lessor of his re-entry, for this voidable lease may well be affirmed by acceptance of rent, and, therefore, if a man makes a lease for years on condition that, if the lessee does not go to Rome, or any other collateral condition, with conclusion that the lease shall be void, in that case, if the lessor grants over the reversion, and afterwards the condition is broken, the grantee shall take benefit thereof, for the lease is void and not voidable by re-entry. Therefore, the grantee who is a stranger may take benefit thereof, but, if the lease be made for life with such condition, there the grantee shall never take benefit of it, for the estate for life does not determine before entry, and entry or re-entry in no case (by the common law) can be given to a stranger: 11 Hen. 7, 17 A.; Br. Cond. 245; 10 Edw. 3, 52, per STONORE; 21 Hen. 7, 12 A. So, if a parson, vicar, or prebend, makes a lease for years, rendering rent, and dies, the successor accepts the rent, it is nothing worth, for the lease was void by his death, otherwise is it of a lease for life; but if a bishop, abbot, prior, or such like makes a lease for years and dies, if the successor accepts the rent, he shall never avoid the lease, for the lease was only voidable: 11 Edw. 3 Abbot 9; 8 Hen. 5, 19; 24 Hen. 8, Br. Leases 19; FITZHERBERT'S NATURA BREVIUM 50 C.

But note, reader, I conceive that in the case of a lease for life, if the lessor accepts the same rent which was demanded, he has affirmed the lease, for he cannot receive it as due on any contract as in the case of a lease for years, but he ought to receive it as his rent, and then he does affirm the lease to continue, for when he accepted the rent, he could not have an action of debt for it, but his remedy then was by assize, if he had seisin, or by distress. Therefore, I conceive in such case the acceptance of the rent shall bar him of his re-entry, and it appears by LITTLETON, cap. Conditions, fol. 79 a that in such case, if the lessor brings an assize for the rent, he relinquishes and waives the benefit of his re-entry although it be for the rent due at the same day, but, if he re-enters first, then he may have an action of debt for the rent behind: 17 Edw. 3, 73; 18 Edw. 3, 10; 30 Edw. 3, 7; 38 Edw. 3, 10. Afterwards, in Michaelmas Term, 1597, in the Common Pleas [*March* v. *Curtis* (2)], in trespass between March and Curtis, for land in Essex, the like judgment was given by ANDERSON, C.J., there WALMSLEY, J., and the whole court, where a lease for years was made, rendering rent, and with condition that if the lessee should assign his term, the lessor might re-enter, and the lessee assigned his term, that, although the lessor had accepted the rent by the hands of the lessee, yet, forasmuch as the lessor had not notice of the assignment, the acceptance of the rent did not conclude him of his entry, so this point has been adjudged by both courts: see for the said differences (which lie obscurely in our books) 45 Ass. 5, the case of waste; 22 Hen. 6, 57; 6 Hen. 7, 3 B.; FITZHERBERT'S NATURA BREVIUM 120, 122; *Browning* v. *Beston* (1) (1 Plowd. 133, 545); 14 Ass. 11; 40 Edw. 3. Entry Congeable 41; 11 Hen. 7, 17; 10 Edw. 3, 52; 21 Hen. 7, 12; 21 Hen. 6, 24; 39 Hen. 6, 27; 26 Hen. 8.

In these two cases many good cases and differences were taken when acceptance of rent (or other things) shall bar him who accepts it of the arrearages of the rent, of re-entry, of action, or of execution, and the reason of the old books briefly reported, and in an obscure manner, well explained. If he who has a rent-service or a rentcharge accepts the rent due at the last day and thereof makes an acquittance, all the arrearages due before are thereby discharged. So was it adjudged in *Morton* v. *Hopkins* (3) in the Common Pleas, Hil. 10 Eliz. Rot. 950, vide Dyer, 271 but there the case is left at large, and therewith agrees 11 Hen. 4, 24 and 1 Hen. 5, 7 B. But, note, it appears by the said record of 10 Eliz. that the bar to the avowry ought to be in such case with conclusion of judgment, if against this deed of acquittance he ought to make avowry, so that it appears that the acquittance is the cause of the bar of estoppel in such case. For it appears by 8 Ass. pl. ult.; 9 Edw. 3, 9; 29 Edw. 3, 34, that, if a man makes a lease for life rendering rent, or

A if there be lord and tenant by fealty and rent, and the rent is behind for two years, and afterwards the lessor, or the lord, disseises the terre-tenant, and afterwards the tenant recovers against him in assize, and the rent which incurred during the disseisin is recouped in damages, yet the lord or lessor shall recover in the assize the arrearages before the disseisin and the bar of the latter years is no bar of the arrearages before: vide 39 Hen. 6, Bar. 79, where the principal case of annuity may be good law either B because there the defendant pleaded the acquittance for the last day, and demanded judgment of action, where he ought to have relied upon the acquittance. Or because, in the case of annuity, he is not bound to pay the annuity without acquittance, but in the case of rent-service, or rentcharge he who receives it is not compellable to make an acquittance, but the making thereof is his voluntary act, to which the law does not compel him.

C If there be lord and tenant and the rent is behind, and the tenant makes a feoffment in fee, if the lord accepts the rent or service of the feoffee, he shall lose the arrearages in the time of the feoffor, although he makes no acquittance, for after such acceptance he shall not avow on the feoffor at all, nor on the feoffee, but for the services which incurred in his time, as appears in 4 Edw. 3, 22; 7 Edw. 3, 8; 7 Edw. 4, 27; 29 Hen. 8, Br. Avowry 111. But in such case, if the feoffor D dies, although the lord accepts the rent or service by the hand of the feoffee, he shall not lose the arrearages, for now the lord cannot avow on other, but only on the feoffee, and that, to which the law compels a man, shall not prejudice him.

So, and for the same reason, if there be lord, mesne, and tenant, and the rent due by the mesne is behind, and afterwards the tenant does forejudge the mesne, and the lord receives the services of the mesne which now issue immediately out E of the tenancy, yet he shall not be barred of the arrearages which issue out of the mesnalty. So, if the rent be behind, and the tenant dies, the acceptance of the services by the hands of the heir shall not bar him of the arrearages, for in these cases, although the person be altered, yet the lord doth accept the rent and services of him who only ought to do them: all this appears in 4 Edw. 3, 22; 7 Edw. 3, 4; 7 Edw. 4, 27; 29 Hen. 8, Avowry Br. 111. But acceptance of rent or services by F the hands of the feoffee shall not bar the lord of the relief before due, for relief is no service but a fruit and approvement of services; for if it were part of the services, then an action of debt would not lie for it so long as the rent continues, but it is as a blossom of fruit fallen from the tree, and for relief, it is not necessary to avow on any person certain. The book in 4 Edw. 3, 22, is to be intended, that the father made a feoffment in fee by collusion and died, and there it is held that G if the lord had accepted the services by the hands of the feoffee in the life of the father, he should lose his relief. But note, reader, relief was not taken within the equity of the Statute of Marlebridge, as it is adjudged in 17 [27] Edw. 3, 63, but now it is remedied by the Wills Acts, 1540 and 1542. But in the case before, the lord (before acceptance of the rent or service by the hands of the feoffee) might H have avowed on the feoffee for all the arrearages incurred as well in the time of the feoffor as in the time of the feoffee, as it is in 7 Hen. 4, 14; 19 Edw. 2, Avowry 222. By what has been said it appears that the acceptance of homage or any other service of the heir shall not bar the lord of relief, vid. temp. Edw. 1, Relief 13; 15 Edw. 3, ib. 5; 16 Edw. 3, ib. 10; 3 Edw. 2, Avow. 190.

It was further said that, if there be lord and tenant by knight's service, and the I tenant enfeoffs his son and heir apparent within age by collusion, if the lord accepts the services by the hands of the feoffee, he shall lose the wardship. But against that it was objected: (i) That the feoffee might compel the lord to avow on him by giving notice and tendering the arrearages, and that which the law compels one to do shall not prejudice or estop him. (ii) That acceptance does not conclude before title accrued, and no title of wardship in this case was accrued to the lord at the time of the acceptance, but it accrued after the death of the feoffor. As to the first, it was answered that the feoffee by no tender that he could make could compel the lord to avow on him, for the lord might show that the feoffment was by

collusion against the Statute of Marlebridge, cap. 6, and, therefore, he might maintain his avowry on the feoffor, for the law will not compel him to avow on the feoffee to his prejudice. As to the second, it was answered that the Statute of Marlebridge has made such feoffment, made by collusion, as void and of no effect as to the lord, and, therefore, if the lord will affirm the feoffment and waive the benefit of the act by accepting the feoffee for his tenant, he shall purge the collusion and lose the wardship. The reason of PRISOT, 33 Hen. 6, 16, that such acceptance should not conclude the lord was because the feoffee in such case might compel the lord to avow on him, but that is not law, and against the opinion of PRISOT, see 31 Hen. 3, Garde 154; 33 Edw. 3, Garde 33; FITZHERBERT'S NATURA BREVIUM 142. And now the doubt in 36 Edw. 3, Garde 11, is well explained.

MILLER AND ANOTHER *v.* MANWARING

[COURT OF KING'S BENCH (Richardson, C.J., Jones, Berkeley and Sir George Croke, JJ.), 1635]

[Reported Cro. Car. 397; 79 E.R. 947]

Landlord and Tenant—Lease—Commencement—End of previous lease—Avoidance of previous lease.

Where a lease is to take effect from the expiration of a previous term and the previous lease is avoided the new lease takes effect immediately on the avoidance of the earlier lease.

Landlord and Tenant—Lease—Determination—Lease granted by tenant by the curtesy—Death of lessor.

A lease granted by a tenant by the curtesy is absolutely determined by his death.

Notes. Tenancy by the curtesy was in general abolished by the Administration of Estates Act, 1925, in the case of a wife dying after Dec. 31, 1925, but it can still arise on the death of a female tenant in tail who has not disposed of her entailed interest by will.

Distinguished: *Lloyd* v. *Gregory* (1639), Cro. Car. 501. Referred to: *Foot* v. *Berklay* (1670), 2 Keb. 654; *Blackmore* v. *Cumberford* (1680), Freem.K.B. 527; *Ward* v. *Lumley* (1860), 24 J.P. 150.

As to the commencement of a term after the occurrence of a future event, see 23 HALSBURY'S LAWS (3rd Edn.) 532, and as to estate by the curtesy, see ibid., vol. 32, pp. 299–302. For cases see 30 DIGEST (Repl.) 479–483; 38 DIGEST (Repl.) 802–806.

Cases referred to:

(1) *Harvey* v. *Thomas* (1590), cited 2 Co. Rep. 77 b; Cro. Eliz. 216.

(2) *Paine's Case* (1587), 8 Co. Rep. 34 a; 77 E.R. 524; sub nom. *Paine* v. *Samms*, 1 And. 184; sub nom. *Plain* v. *Sams*, Gouldsb. 81; sub nom. *Sammes and Payne's Case*, 1 Leon. 167; 38 Digest (Repl.) 804, *239*.

(3) *Bishop of Bath's Case* (1605), 6 Co. Rep. 34 b; 77 E.R. 303; sub nom. *Fish* v. *Bellamy*, Cro. Jac. 71; 30 Digest (Repl.) 482, *1249*.

(4) *Throckmerton* v. *Tracy* (1555), ante p. 168; 1 Plowd. 145; 75 E.R. 222; sub nom. *Throgmorton* v. *Tracey*, 2 Dyer, 124 a; 30 Digest (Repl.) 482, *1242*.

(5) *Palmer's Case* (1597), 4 Co. Rep. 74 a; 76 E.R. 1045; sub nom. *Palmer* v. *Humphrey*, Cro. Eliz. 584; Gouldsb. 172; 21 Digest (Repl.) 608, *976*.

(6) *Pigot's Case* (1614), ante p. 50; 11 Co. Rep. 26 b; 77 E.R. 1177; sub nom. *Winchcombe* v. *Pigot*, 2 Bulst. 246; sub nom. *Winscombe* v. *Piggott*, 1 Roll. Rep. 39; sub nom. *Anon.*, Moore, K.B. 835; 12 Digest (Repl.) 405, *3134*.

(7) *Anon.* (1567), 3 Dyer, 261 b; Jenk. 232; 73 E.R. 580; 12 Digest (Repl.) 405, *3133*.

(8) *Leyfield's Case* (1611), 10 Co. Rep. 88a; 77 E.R. 1057; 22 Digest (Repl.) 204, *1914*.

(9) *Lofield's Case* (1612), 10 Co. Rep. 106 a; 77 E.R. 1086; sub nom. *Young* v. *Melton*, 1 Brownl. 61; 31 Digest (Repl.) 243, *3773*.

(10) *Saffyn's Case* (1605), 5 Co. Rep. 123 b; 77 E.R. 248; sub nom. *Saffyn* v. *Adams*, Cro. Jac. 20; 30 Digest (Repl.) 482, *1251*.

(11) *Wrotesley* v. *Adams* (1560), 1 Plowd. 189; 2 Dyer, 177 b; 75 E.R. 290; 31 Digest (Repl.) 571, *6913*.

(12) *Bracebridge* v. *Clowse* (1571), 2 Plowd. 420; 75 E.R. 633; 30 Digest (Repl.) 479, *1210*.

(13) *Smith* v. *Stapleton* (1573), 2 Plowd. 426.

(14) *Mildmay's Case* (1584), 1 Co. Rep. 175 a; Jenk. 247; 76 E.R. 379; sub nom. *Mildmay* v. *Standish*, Cro. Eliz. 34; Moore, K.B. 144; 17 Digest (Repl.) 343, *1493*.

Error of a judgment at Chester in an ejectment of lands in Blacon of the demise of Sir Randolph Crew, on Aug. 12, 1607.

John Earl of Oxford and Elizabeth his wife in right of the said Elizabeth were seised in fee of the manor of Blacon whereof the land in question was parcel, and had issue John. By an indenture dated Feb. 10, 1535, John Earl of Oxford let that manor to Anne Seaton for thirty-four years. Elizabeth died in 1537, and on Mar. 21, 1539, John Earl of Oxford died. On July 30, 1543, John the son, then Earl of Oxford, by indenture, reciting the lease to Anne Seaton to be dated Feb. 10, 1536, let the said manor to Robert Rochester.

"Habendum after the end, surrender, or forfeiture of the said lease to Anne Seaton for thirty years."

After the making of the said indenture the words "28 Hen. 8" [i.e., the date 1536] were erased and altered to "27 Hen. 8" [i.e. 1535]. On Mar. 26, 1543, the said John Earl of Oxford, by indenture between him and Hamlet Freere (reciting the lease to Anne Seaton of Feb. 10, 1535) granted the reversion of the manor and premises to Hamlet Freere,

"Habendum the said manor and premises from such time as the same shall revert and come to the possession of the said earl or his heirs by surrender, forfeiture, or otherwise, for sixty years."

In 1561 the said John Earl of Oxford died seised, and the said manor descended to his son Edward Earl of Oxford. He by indenture between him and Geoffrey Morley, dated July 14, 1573, reciting:

"Whereas John his father by indenture dated July 30, 1543, demised to Robert Rochester the said term or manor of Blacon, habendum for thirty years, from the end or determination of the lease made to Anne Seaton, dated Feb. 10, 28 Hen. 8 [i.e., 1536] for twenty-four years [a false recital] and re-granted the lease to Hamlet Freere for sixty years, to begin after the expiration, surrender, or forfeiture [omitting the words 'or otherwise'], of the lease to Anne Seaton, the said Edward Earl of Oxford demised the said manor and ferm of Blacon to the said Geoffery Morley, habendum from the end of the said leases for fifty years."

So the question was whether any of these leases to Hamlet Freere or Morley be good and were in esse at the time of the lease made by Sir Randolph Crew, for Sir Randolph Crew claimed the inheritance of the manor from the Earl of Oxford, and Sir William Norris claimed the leases from Morley and Freere, and under

him the defendant claimed. Judgment was given in Chester for the plaintiff. The defendant appealed, the ground of appeal being that judgment was given for the plaintiff, where it ought to have been given for the defendant.

Rolle and *Mason* for the defendant.
Calthrop and *Serjeant Hedley* for the plaintiff.

The first question moved was whether the lease to Anne Seaton was determined after the death of John Earl of Oxford who was seised of the property in the right of his wife and tenant by the curtesy or only determinable by the entry of the heir, for, if it were only determinable, then, no entry of the heir being found, it was continued and the reversion was in the Earl of Oxford, the son at the time of the lease made to Hamlet Freere. On this point **RICHARDSON, C.J.**, agreed with the other justices that it was determined and void by the death of the said John then Earl of Oxford, tenant by the curtesy, the wife being dead before, and then Anne Seaton was but tenant at sufferance and the freehold in the Earl of Oxford, and no reversion; and for that point overruled it without further argument. The lease was absolutely determined by the death of the tenant by the curtesy, and no acceptance of the rent or confirmation after by the heir can make it have continuance: vide 1 Edw. 6, "Acceptance," 19; 2 Co. Rep. 77 b, *Harvey* v. *Thomas* (1) cited: *Paine's Case* (2).

Secondly, when the lease to Rochester began. As to that all the justices resolved that it began presently at the time of the sealing, because there was no such lease in esse to Anne Seaton at the time of the lease to Rochester, it having been determined three years before by the death of the Earl of Oxford, and there was no such lease made to Anne Seaton but had other beginning and other ending than is recited. Therefore, it began presently: vide 3 Edw. 6, Br. "Leases," 62; 6 Co. Rep. 36 a. in the *Bishop of Bath's Case* (3); *Throckmerton* v. *Tracy* (4) (1 Plowd. 145); Co. Litt. 46 b.; *Palmer's Case* (5); 2 Dyer, 116.

Thirdly, the lease to Rochester being erased in a material part after the sealing and delivery thereof, whether that erasure be a cause to make the lease void or if the lease be good notwithstanding this erasure. **JONES** and **BERKELEY, JJ.**, held that the deed was avoided by the erasure, but the lease was good, and remained in esse notwithstanding this erasure, and as to that took a difference when an estate loses his essence by a deed, viz., where it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rentcharge, or such like, if the deed be erased after delivery, it determines the estate and makes it void, but when the estate may have essence without a deed, there, although it be created by a deed, and the deed is after erased by the party himself or a stranger, that shall not destroy the estate although it destroys the deed. Wherefore erasure here does not make the lease void and determine it. But **SIR GEORGE CROKE, J.**, argued to the contrary in this point, that as it is a lease by the deed it is a contract by the deed, and the party himself who has the interest by the deed erasing that deed, he determines the deed and his interest by this voluntary act, as if he had surrendered, and, the contract being by deed, he may not determine the deed and the covenants, but quoad himself he does destroy it, but peradventure quoad the lessor it may have essence, if the lessor will, but this is at his election, and not at the election of the lessee: see for this point, *Pigot's Case* (6); *Anon.* (7); *Leyfield's Case* (8); 7 Edw. 3, 57; 14 Hen. 8, 27; per Brooke, 44 Edw. 3, 42.

Fourthly, whether the lease to Hamlet Freere be good or void. That rests upon the consideration whether the lease of the land by the name of a reversion, where it has the land in possession and has no reversion (as it is if Seaton's lease be determined in fact, and Rochester's lease be void by the erasure, or that he be not in possession by virtue of the lease because it is not found that Rochester entered by virtue of the lease, and so cannot be an estate turned into a reversion), be a good lease. For this point all the justices agreed that it is merely a void lease, for the grant in the premises is only of a reversion, and it was the intent of the parties to pass

A the reversion only expectant upon the former leases. When there is no reversion, it cannot pass the land in possession, for by the name of a reversion lands in possession cannot pass, but by the name of land a reversion may well pass, for he who will grant land in possession will rather grant them in reversion, but not so e converso. Although the habendum is "to have and to hold" the land, that shall not pass the land in possession, for it is intended he should have the lands so returning. Deeds are to be con-
B strued that they shall pass things according to the intent of the parties, and the strongest against the grantor according to the apparent intent. Here the grant and demise is only of a reversion, and the habendum shall enlarge it contrary to the grant. So this lease to Hamlet Freere is merely void; and if it be not void, it is determined in time, for it began from the date, and then it is determined by effluxion of time: see express authorities, that by the grant of a reversion, if he has not a reversion,
C nothing passes: Co. Litt. 46, 324 b.; *Lofield's Case* (9). This point is recited to be so resolved, 5 Co. Rep. 124 b. *Saffyn's Case* (10); Plowd. 196 [*Wrotesley* v. *Adams* (11)], 423 [*Bracebridge* v. *Clowse* (12)], 433 [*Smith* v. *Stapleton* (13)] 146 in *Trockmerton* v. *Tracy* (4), where it was said that the words "and other the premises" would carry it, it was answered, that cannot be for "other" is always another thing than that before mentioned; the reversion of the manor of Blacon is expressly men-
D tioned so "other" cannot be extended to it: vide 1, Co. Rep. 177 a [*Mildmay's Case* (14)]; 35 Hen. 8, "Grants," Br. 150.

The fifth question was whether Morley's lease was in esse at the time of this lease made by the plaintiff. It was resolved that it was not, for that misrecites the former leases, and so has the same rule as the former where it recites leases and there be not such. Therefore, it shall begin from the date which, being in
E 1573 for fifty years, ending 1623. Wherefore for all these reasons the judgment was affirmed.

F

CASE OF SWANS

[Court of King's Bench, Trinity Term, 1592]

[Reported 7 Co. Rep. 15 b; 77 E.R. 435]

G

Animal—Feræ naturæ—Ownership—Qualified property in tamed animal—Tamed animal subject of larceny—Animals in park or warren—Property ratione soli.

A person cannot have absolute property in any animal feræ naturæ. He may attain to a qualified and possessory property by taking and taming such an animal, and he may retain that property so long as it remains tame, but if the
H animal recovers its liberty and has no animus revertendi the property is lost. An animal feræ naturæ which has been tamed can be the subject of larceny at common law. A landowner who has animals feræ naturæ in a park or warren on his land has a qualified property ratione soli in those animals while they are there.

Animal—Swan—Ownership—Crown—Private owner—Cygnets.

I A swan is a royal fowl, and all swans the owner of which is not known belong to the Crown. If a person has a lawful swan mark obtained by royal grant or prescription, and has swans swimming in an open and common river which are lawfully marked, the swans belong to him ratione privilegii. Anyone who has swans within his private water has a property in them, and, if a swan escapes from those waters into an open river, their owner may take them back. Aliter if the swan fully regains its liberty, for then the officers of the Crown can seize it. Where the cock swan belongs to one owner and the hen to another their cygnets belong to both owners in common.

Notes. Considered: *Hannam* v. *Mockett* (1824), 4 Dow. & Ry.K.B. 518; *Blades* v. *Higgs* (1865), 20 C.B.N.S. 214; *Tucker* v. *Farm and General Investment Trust, Ltd.*, [1966] 2 All E.R. 508. Referred to: *Lyster* v. *Home* (1639), Cro. Car. 544; *Davies* v. *Powell* (1738), Cooke, Pr. Cas. 146; *R.* v. *Robinson* (1859, Bell, C.C. 34.

As to property in wild animals, see 1 HALSBURY'S LAWS (3rd Edn.) 656–658. For cases see 2 DIGEST (Repl.) 292–300.

Cases referred to:

(1) *Fines* v. *Spencer* (1572), 3 Dyer, 306 b; 73 E.R. 692; 2 Digest (Repl.) 293, *15.*

(2) *Anon.* (1527), Y.B. 18 Hen. 8, fo. 2, pl. 11; Jenk. 193, 204; 145 E.R. 130, 138; 2 Digest (Repl.) 297, *48.*

Action by the Queen against Lady Joan Young, the widow of Sir John Young, deceased, and Thomas Saunger, defendants regarding the ownership of swans.

An office was found at W., in the county of Dorset, on Sept. 18, 1589, before SIR MATTHEW ARUNDEL and other commissioners of the Queen under the Great Seal, quod a villa de Abbotsbury, in præd' com' Dorset, usque ad mare per insulam de Portland in eodem com' est quædam æstuaria, Anglicè a mere or fleet, in quam mare fluit et refluit, in qua quidem æstuaria sunt 500 cigni quorum 410 sunt albi et 90 sunt cignetti, et quod omnes prædicti cigni et cignetti sunt in possessione J. Young et Tho. Saunger, et quod quilibet eorum est valoris 2s. 6d. quodque major pars tempore captionis dictæ inquisitionis minime fuer' signat', which office being certified into the Exchequer, a writ was directed to the sheriff of the county to seize all the white swans not marked. By force whereof the sheriff returned that he had seized four hundred white swans, to which in Hilary Term, 1591, Joan Young and Thomas Saunger pleaded quod præd æstuaria sive aqua, jacet in paroch' de Abbotsbury in com. Dorset (and abutted it), and that before the inquisition taken, the abbot of Abbotsbury was seised de præd æstuaria, et de ripis et solo ejusdem in fee, and that at the time of the inquisition, and time out of mind, fuit et adhuc est quidam volatus cignorum et cignettor' feror', vocat' a game of wild swans, in æstuaria sive aqua illa, et ripis, et solo ejusdem nidificant', gignen' et frequentant' Anglice haunting, de quo quidem volatu cignor' et cignettor', præd' Abbas et omnes prædecessores sui Abbates monasterii præd', per totum tempus prædict' habuere et gavisi fuerunt, et habere et gaudere consueverunt, tot' profic' et increment' omnium et singulor' cignor' et cignettor' feror', in æstuaria præd' nidificant', gignen' et frequent' qui quidem cigni et cignetti per totum tempus præd' fuerunt feræ naturæ, et infra idem tempus iidem cigni et cignetti seu eorum aliqui aliquo signo non usi fuissent, nec consuevissent signari, nisi quod præd' nuper Abbas et prædecessores sui præd' per totum tempus præd' ad eorum libitum quosd' seu aliquos de minorib' cignettis annuatim pullulant' quos ad usum et culinæ et hospitalitatis suæ statuerunt expendend', in hunc modum annuatim signare consuerverunt, et usi fuerunt, viz. amputare mediam juncturam unius alæ, Angl' to cut off the pinion of one wing, cujuslibet talis cignetti, eâ intentione, quod cignetti sic amputati minime valerent avolare.

The abbot surrendered the premises to King Henry VIII who in 1543 granted to Giles Strangways, Esq., by his letters patent inter alia, totam illam liberam piscariam nostr' in aqua, vocat' the fleet in Abbotsbury præd', ac omnia messuag', aquas, piscat' et cætera hæreditam' nostr' quæcunque in Abbotsbury, in dict' com' Dorset dict' nuper monasterio, etc., adeo plene et integre, etc., et in tam amplis modo et forma, etc. It was stated that the said Giles died, and the premises descended to Giles Strangways, his cousin and heir, who demised to the defendants the said game of swans for one year, etc., and prayed quod manus dictæ dominæ reginæ amoveantur. Upon which the Queen's Attorney did demur in the law.

It was resolved that all white swans not marked which, having gained their natural liberty and were swimming in an open and common river, might be seized to the King's use by his prerogative, because volatilia (quæ sunt feræ naturæ) alia sunt regalia, alia communia, and so aquatilium, alia sunt regalia, alia communia as a swan is a royal fowl. All those the property whereof is not known do belong

A to the King by his prerogative, and so whales [sic] and sturgeons are royal fish, and belong to the King by his prerogative. There had been an ancient officer of the King's, called magister deductus cignorum, which continued to that day. But it was resolved also that the subject might have property in white swans not marked as some might have swans not marked in his private waters, the property of which belonged to him and not to the King, and if they escaped out of his private waters B into an open and common river, he might bring them back and take them again. Therewith agrees Bracton, lib. 2, c. 1, fol. 9:

> "Si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant, (ut sunt cervi, cigni, pavones, et columbæ, et hujusmodi) eousque nostra intelligantur quamdiu habuerint animum revert- C endi."

But if they have gained their natural liberty and are swimming in open and common rivers, the King's officer may seize them in the open and common river for the King, for one white swan, without such pursuit as aforesaid, cannot be known from another, and when the property of a swan cannot be known, the same, being of its nature a fowl royal, belongs to the King.

D In this case the Year Book 7 Hen. 6, 27 8. was vouched, where Sir John Tiptoft brought an action of trespass for wrongful taking of his swans. The defendant pleaded that he was seised of the lordship of S. within which lordship all those whose estate he had in the said lordship had had time out of mind all estrays being within the said manor. The defendant said that the said swans were Estraying at the time in the place where, etc., and that he as landlord did seize and make E proclamations in fairs and markets, and so soon as he had notice that they were the plaintiff's swans, they delivered them to him at such a place. The plaintiff replied that he was seised of the manor of B. joining to the lordship of S.; and that he and his ancestors, and all those etc., have used time out of mind to have swans swimming through all the lordship of S., and that a long time before the taking they put them in there and gave notice to the defendant that they were F their swans, and prayed his damages. The opinion of Strangeways, J., there was well approved by the court, that the replication was good, for when the plaintiff might lawfully put his swans there, they could not be Estrays, more than the cattle of any could be Estrays in such place where they ought to have common because they were there where the owner had an interest to put them and where they might be without negligence or laches of the owner.

G Out of which case these points were observed concerning swans: (i) Everyone who has swans within his manor, that is to say, within his private waters, has a property in them. (ii) One may prescribe to have a game of swans within his manor, as well as a warren, or park. (iii) He who has such a game of swans may prescribe that his swans may swim within the manor of another. (iv) A swan may be an Estray, and so cannot any other fowl, as I have read in any book. In Y.B. H 2 Rich. 3, 15 b. and 16 a. Lord Strange and Sir John Charlton brought an action of trespass against three, because the defendants had taken and carried away forty cygnets of the plaintiff's in the county of Bucks to his damages of £10. One of the defendants pleaded that the water of the Thames ran through the whole realm, that the county of Buckingham was adjoining to the Thames, and that the custom of the county of Buckingham was and had been time out of mind that if I any swan (for cygnet in the book was taken for a swan) which had its course in any water that ran to the Thames within the same county comes on the land of any man and there built, and had cygnets on the same land, then he who had the property of the swan should have two of the cygnets, and he who had the land should have the third cygnet, which should be of less value than the other two. That was adjudged a good custom, because the possessor of the land suffered the swan to build there where he might drive them off.

By this judgment it also appeared that a man might allege a custom or prescribe in swans or cygnets. In the same case it was said that the truth of the matter

was that Lord Strange had certain swans which were cocks and Sir John Charlton certain swans which were hens, and they had cygnets between them, and for these cygnets the owners joined in one action for in such case by the general custom of the realm, which was the common law in such case, the cygnets belonged to both the owners in common equally. The law thereof was founded on a reason in nature, for the cock swan was an emblem or representation of an affectionate and true husband to his wife above all other fowls; he holds himself to one female only, and for this cause nature has conferred on him a gift beyond all others, that is, to die so joyfully that he sings sweetly when he dies; upon which the poet says:

Dulcia defecta modulatur carmina lingua,
Cantatur, cygnus, funeris ipse sui, etc.

Therefore, this case of the swan differs from the case of kine or other brute beasts: vide 7 Hen. 4, 9. It was agreed that none can have a swan mark, which in Latin is called (cigninota) unless it be by the grant of the King, or of his officers authorised thereto, or by prescription. If he has a lawful swan mark, and has swans swimming in open and common rivers lawfully marked therewith, they belong to him ratione privilegii. But none shall have a swan mark or game of swans unless he has lands or tenements of an estate of freehold of the yearly value of five marks, above all charges, on pain of forfeiture of his swans, whereof the King shall have one moiety and he who seises shall have the other moiety. That is by the statute of 22 Edw. 4, c. 6 [Swans Act, 1482: repealed by Game Act, 1831]. He who has such swan mark may grant it over. Thereof I have seen a notable precedent in the time of Henry VI which is such

"notum sit omnib' hominib' præsentib' et futuris, quod ego J. Steward, miles, dedi et concessi Tho' fii' meo primogenito et hæredib' suis, cigninot' meam armor' meor', prout in margine, laterali pingitur, quæ mihi jure hæreditar' descendeb' post mort' J. Steward mil' patris mei: habend' sibi et hæredib' suis, una cum omnib' cignis et cignicul' cum dicta nota baculi nodati signat', sub condit' quod quilib' feria solis durante vitâ a gula Augusti usque ad Cornisprivium apud dom' meam de Darford, unum cignicul' bene signat' mihi aut meis deliberet, quod si defecerit, tunc volo, quod hoc præsens chirographum cassetur penitus, et pro nihilo habeatur. In cuj' rei testimon' ad instant' Matildæ uxor' meæ, meum sigil' secret' Christi crucifixi præsentib' feci apponi. Hiis testib' R. Clerico, J. D. Conyers, Alano Fabro, et al' dat. apud dom' meam mansional' de Darf. in vigilia S. Dunst' ep' an' regni Regis Hen' post conquest' Angliæ sexti 14."

In the margin was printed a little ragged staff. In this case it was resolved that in some of them which are feræ naturæ, a man has jus proprietatis, a right of property; and in some of them a man has jus privilegii, a right of privilege. There are three manner of rights of property, property absolute, property qualified, and property possessory. A man has not absolute property in anything which is feræ naturæ, but in those which are domitæ naturæ. Property qualified and possessory a man may have in those which are feræ naturæ, and to such property a man may attain by two ways, by industry, or ratione impotentiæ et loci—by industry as by taking them or by making them mansueta, i.e., manui assueta, or domesticæ, i.e., domui assueta. But in those which are feræ naturæ and by industry are made tame a man has but a qualified property, i.e., so long as they remain tame, for if they do attain to their natural liberty, and have not animus revertendi, the property is lost, ratione impotentiæ et loci. If a man has young shovelers or goshawks, or the like, which are feræ naturæ and they build in my land, I have possessory property in them, for if one takes them when they cannot fly the owner of the soil shall have an action of trespass, Quare boscum suum fregit, et tres pullos espervor' suor', or ardear' suar' pretii tantum, nupe in eod' bosco nidificant', cepit, et asportav'. Therewith agrees the Registrar and Fitzherbert's Natura Brevium 86 L. and 89 K.; 10 Edw. 4, 14; 18 Edw. 4, 8; 14 Hen. 8, 1 B.; Staun-

A FORD 25 b. etc., vide 12 Hen. 8, 4 and 18 Hen. 8, 12. But when a man has savage beasts ratione privilegii, as by reason of a park, warren, etc., he has no property in the deer, or conies, or pheasants, or partridges, and, therefore, in an action, quare parcum warrennum, etc., fregit et intrav', et 3. damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit, he shall not say (suos) for he has no property in the deer, or conies, or pheasants, or partridges, and, therefore, in an action, quare
B so long as they remain in the privileged place. If the owner of the park dies, his heirs shall have them and not his executors or administrators, because without them the park, which is an inheritance, is not complete, nor can felony be committed of them, but of those which are made tame in which a man by his industry has any property, felony may be committed. Therewith agrees the rule of the book in 3 Hen. 6, 55 B.; 8 Edw. 4, 5 B.; 22 Hen. 6, 59, which is ill reported; and 43 Edw. 4,
C 24; vide 22 Ass. 12 Hen. 3; *Fines* v. *Spencer* (1). 38 Edw. 3, 10; vide 2 Edw. 2, tit. Distress; 2 Edw. 2, Avowry 182. But a man may have property in some things which are of so base a nature that no felony can be committed of them, and no man shall lose life or member for them, as of a bloodhound or mastiff, molessus, 12 Hen. 8, 3; vide 18 Hen. 8, 2 [*Anon.* (2)]. But he who steals the eggs of swans out of the nest shall be imprisoned for a year and a day and fined at the will of the
D King, one moiety to the King, the other to the owner of the land where the eggs were so taken, and that is by the Statute of 11 Hen. 7, c. 17 [Customs Act, 1495: repealed by stat. 3 Geo. 4, c. 41 (1822)].

It had been said of old time that if a swan was stolen in an open and common river, lawfully marked, the same swan (if it could be), or another swan, should be hung in a house by the beak, and he who stole it should in recompense thereof
E be obliged to give the owner as much wheat as would cover all the swan, by putting and turning the wheat on the head of the swan, until the head of the swan be covered with the wheat. It was resolved that in the principal case the prescription was insufficient, for the effect of the prescription was to have all wild swans, which were feræ naturæ, and not marked nidificant' gignent', et frequentant', within the said creek. Such prescription for a warren would be insufficient, scil., to have all
F pheasants and partridges, nidificantes, gignentes, and frequenting within his manor. He ought to say, to have free warren of them within his manor, for, although they were nidificantes, gignentes, and frequenting within the manor, he could not have them jure privilegii, but so long as they were within the place. But it was resolved that, if the defendants had alleged that within the said creek there had been time out of mind a game of wild swans not marked, building and breeding, and then had
G prescribed that such abbot and all his predecessors, etc., had used at all times to have and take to their use some of the said game of wild swans and their cygnets within the said creek, it would have been good; although swans were royal fowls, yet in such a manner a man might prescribe in them, for that might have a lawful beginning by the King's grant: in ROT. PARLIAM. 30 Edw. 3, part 2, no. 20, the King granted to C. W. all wild swans unmarked between Oxford and London for
H seven years. In eodem Rot' an' 16 Rich. 2, p. 1, no. 39, the like grant of wild swans unmarked in the county of Cambridge to B. Bereford Kt. In eodem Rot' an' 1 Hen. 4, p. 6, 18 b. no. 14. A grant made to J. Fenn to survey and keep all wild swans unmarked, ita quod de proficuo respondeat ad Scaccarium. By which it appeared that the King might grant wild swans unmarked, and by consequence a man might prescribe in them within a certain place, because it might have a lawful
I beginning. A man might prescribe to have royal fish within his manor, as it is held in 39 Edw. 3, 35, for the reason aforesaid. Yet without prescription they belonged to the King by his prerogative.

TYRRINGHAM'S CASE

[Court of Queen's Bench (Sir Christopher Wray, C.J., Gawdy, J., and other judges), Michaelmas Term, 1584]

[Reported 4 Co. Rep. 36 b; 76 E.R. 973]

Commons—Common of pasture—Appendant—Appurtenant—Ancient arable land —Building on land or conversion to pasture—Purchase of part of land— Extinguishment of right.

Common of pasture appendant belongs only to ancient arable land, and is only for horses and oxen to plough, and cattle and sheep to manure, the land. Common appendant remains although a house has been built on the arable land or the land has been converted to pasture. If a commoner purchases a part of the land the resultant part is entitled to common appendant, the common is apportioned, and the tenant charged out of his land with the residue of the common only. But where the common is appurtenant, and so against common right, and not appendant, the common is extinguished by the purchase of part of the land. Where there arises unity of ownership of the whole of the land which gives the right and of the land which is the subject of the right the right of common is extinguished whether it be appendant or appurtenant.

Commons—Common of pasture—Vicinage—Common appurtenant—Right of lord to endorse against neighbour.

Common of pasture by reason of vicinage is not common appendant but common appurtenant and in gross, and may commence by grant or by prescription. In case of common by vicinage between adjoining manors the lord of one manor may enclose against his neighbour and thereby take away the right of common.

Notes. Considered: *Jones* v. *Robin* (1845), 10 Q.B. 581. Referred to: *Wild's Case* (1609), 8 Co. Rep. 78 b; *Knight's Case* (1623), Godb. 352; *Millen* v. *Fandrye* (1625), Poph. 161; *Shury* v. *Piggot* (1626), 3 Bulst. 339; *Rumsey* v. *Rawson* (1668), 2 Keb. 410; *King* v. *Rose* (1673), Freem.K.B. 347; *Reynoldson* v. *Blake* (1697), 1 Ld. Raym. 192; *Bennett* v. *Reeve* (1740), Willes, 227; *Barwick* v. *Matthews* (1814), 5 Taunt. 365; *Wells* v. *Pearcy* (1835), 1 Bing.N.C. 556; *Rea* v. *Sheward* (1837), 2 M. & W. 424; *Prichard* v. *Powell* (1845), 10 Q.B. 589; *Jones* v. *Robin* (1847), 10 Q.B. 620; *Warrick* v. *Queen's College, Oxford* (1871), 40 L.J.Ch. 780; *Baring* v. *Abingdon*, [1892] 2 Ch. 374; *A.-G.* v. *Reynolds*, [1911] 2 K.B. 888.

As to common of pasture appendant, appurtenant, in gross, and by vicinage, see 5 Halsbury's Laws (3rd Edn.) 301–312. For cases see 11 Digest (Repl.) 5 et seq.

Cases referred to:

(1) *Hill* v. *Grange* (1555), 1 Plowd. 164; 2 Dyer, 130 b; 75 E.R. 253; 31 Digest (Repl.) 25, *1835*.

(2) *Smith* v. *How and Redman* (circa 1583), cited in 4 Co. Rep. 38 b; 76 E.R. 981; 11 Digest (Repl.) 13, *131*.

Trespass between Phesant, plaintiff, and Salmon, defendant.

Thomas Tyrringham was seised of a house, 44 acres of land, seven acres of meadow, and two acres of pasture at Titchmersh in the county of Northampton, to which house, land, meadow, and pasture, he and all those whose estate he had had used to have common of pasture for oxen, cows, and heifers, levant and couchant upon the house, land, meadow, and pasture, as well in 30 acres of land in the same town (whereof one John Pickering was then seised in fee), as in 40 acres of land and pasture in Titchmersh aforesaid (whereof one Boniface Pickering was then seised in fee) as to the said house, land, meadow, and pasture appertaining. Boniface Pickering, being seised as aforesaid of the said 40 acres, purchased to him and his heirs the said house, 44 acres of land, seven acres of meadow, and two acres of pasture, and being so seised as well of the said 40 acres in which as of the said

tenements to which, etc., demised the house, land, meadow, and pasture to which, etc., to Phesant, who put two cows into the said 30 acres to use the said common, Salmon, who was farmer of John Pickering, with a little dog, leviter et molliter drove out the cows, and Phesant brought this action of trespass for chasing his cattle.

Divers points were resolved by Wray, C.J., Sir Thomas Gawdy, J., et per totam curiam. First, that prescription does not make a thing appendant unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant as a thing corporate cannot be appendant to a thing corporate, nor a thing incorporate to a thing incorporate, as it is held in *Hill* v. *Grange* (1) (1 Plowd. at p. 168). But a thing incorporate, as an advowson, may be to a thing corporate as to a manor, or a thing corporate, as land, to a thing incorporate, as an office, as it is there also held. But everything incorporate cannot be appendant to a thing corporate, as common of turbary cannot be appendant to land, but must be appendant to a house, as it is held in 5 Ass. 9, for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turves are to be spent in a house. So 10 Edw. 3, 5, a leet cannot be appendant to a church or chapel, for they are of several natures. The beginning of common appendant by the ancient law was in such manner. When a lord enfeoffed another of arable land to hold of him in socage, i.e., per servicium socae, as every such tenure at the beginning (as Littleton says) was that the feoffee ad manutenendum servicium socae, should have common in the lord's wastes for his necessary cattle which ploughed and manured his land, and that for two reasons. First, because it was, as it was then held, tacite implied in the feoffment, for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, et per consequens the feoffee should have (as a thing necessary and incident) common in the lord's wastes and land, and that appears by the ancient books in temp. Edward 1, Common 24 and 17 Edw. 2, Common 23, and 20 Edw. 3, Admeasurement 8, and 18 Edw. 3; and by the rehearsal of the Statute of Merton, c. 4.

The second reason was for the maintenance and advancement of tillage, which is much respected and favoured in law, so that such common appendant is of common right and commences by operation of law, and in favour of tillage. Therefore, it is not necessary to prescribe therein, as it is held in 4 Hen. 6, 13 A. and 22 Hen. 6, 10 A. as it would be if it was against common right, but it is only appendant to ancient land arable hide and gain, and only for cattle, sc. horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage. With this resolution agree 37 Hen. 6, 34 a., b., per tot' cur', et 26 Hen. 8, 4 a., as to this latter point, and, therefore, it is against the nature of common appendant to be appendant to meadow or pasture. Because in the case at Bar the prescription was to have common appendant from time whereof, etc., to a house, meadow, and pasture, as well as to arable land, by which it appears to the court that there had been a house, meadow, and pasture, from time whereof, etc., it was, therefore, resolved, that this common was appurtenant and not appendant. But if a man has had common for cattle which serve for his plough appendant to his land, and perhaps of late time a house is built upon part, and some part is employed to pasture and some for meadow, and that for maintenance of tillage which was the original cause of the common, in this case the common remains appendant and shall be intended, in respect to the continual usage of the common for cattle levant and couchant upon such land, at the beginning all was arable but in pleading he ought to have it appendant to land, and although terra dicitur a terendo, quia vomere teritur, yet terra includes all; and although it is now pasture or meadow, yet it is arable, id est, may be ploughed, although it is not now in tillage and ploughed. But if he prescribes to have it appendant to a house or meadow, or pasture, then it appears of his own showing (as has been said) that it had been at all times a house, meadow and pasture, and then he cannot have

common as appendant to it, but such is common appurtenant. A man may prescribe to have common appendant to his manor, for all the demesnes shall be intended arable, or at least shall be in construction of law reddendo singula singulis appendant to such demesnes as are ancient arable land, and not to any land newly ploughed and improved to be arable out of his wastes and moors parcel of the manor, and therewith agrees 5 Ass. 2. Also when a man claims common appendant to his manor, no incongruity, as in the case at Bar, appears of his own showing. So common may be claimed to be appendant to a carve of land, and yet a carve of land may contain pasture meadow, and wood, as it is held in 6 Edw. 3, 42, but no incongruity appears there, and it shall be applied to that which agrees with the nature and quality of a common appendant.

Secondly, it was resolved that common appendant may be apportioned for two reasons. Because it is of common right, and, therefore, if the commoner purchases parcel of the land, yet the common shall be apportioned. If the lord purchases parcel of the tenancy, the rent shall be apportioned, so if A. has common appendant to twenty acres of land and enfeoffs B. of part of the said twenty acres this common shall be apportioned, and B. shall have common pro rata. Where it was objected (i) that the prescription fails in both the cases, for in the first case he never had common in part of the land only, but entirely in all, and it would now be a prejudice to the terre-tenant if he should have common in the thirty acres only for all the cattle levant and couchant upon all the tenements to which, etc., and in the latter case no common was ever appendant to part of the land, but entirely to the whole: also, (ii) in assize of common all the terre-tenants ought to be named, and that cannot be when the commoner himself has purchased part of the land.

As to these objections, it was answered and resolved that as to the first the prescription ought to be special, sc., to prescribe to have common in the whole till such a day and then to show the purchase of part, and from that time that he has put in his cattle into the residue pro rata portione as in the cases when a corporation has liberties by prescription and within time of memory the corporation is altered, there ought to be a special prescription. As to the second case, sc., when part of the land is alienated, there every of them may prescribe to have common for cattle levant and couchant upon his land, and in none of these cases any prejudice accrues to the tenant of the land in which the common is to be had, for he shall not be charged with more upon the matter than he was before the severance. God forbid the law should not be so when part of the land to which, etc., is alienated, for otherwise many commons in England (which God forbid) would be annihilated and lost; and it was agreed that such common which is admeasurable shall remain after the severance of part of the land. But in the case at Bar, forasmuch as the court resolved that the common was appurtenant and not appendant, and so against common right, it was adjudged that by the said purchase all the common was extinct, for in such case, common appurtenant cannot be extinct in part and be in esse for part by the act of the parties. As to the last objection it was answered and resolved that, if upon the matter the common appendant should be apportioned, then the terre-tenant should be only charged out of the land with the residue of the common, as in case where a rentcharge is apportioned in case of descent, the tenant of the land out of which the residue of the rent which remains issues shall only be named. It was said in this case that the word "pertinens" is Latin as well for appurtenant as for appendant, and, therefore, subjecta materia, and the circumstance of the case ought to direct the court to judge the common to be appendant or appurtenant.

It was resolved that unity of possession of the whole land to which, etc., and of the whole land, in which, etc., makes extinguishment of common appendant against the opinions in 11 Edw. 3, Common 11; 14 Ass. 21; 15 Ass. 2; 20 Edw. 3, Admeasurement 8. The reason of which opinions was because the land to which the common was claimed was ancient land hide and gain, and for maintenance and advancement of tillage, but inasmuch as it was against a rule in law, sc., when a man has as high and perdurable estate as well in the land as in the rent, common,

A and other profit issuing out of the same land, there the rent, common, and profit, is extinct, and therewith agrees 24 Edw. 3, 25, 4. In this case WRAY, C.J., said that common for cause of vicinage is not common appendant, but inasmuch as it ought to be by prescription from time whereof, etc., as common appendant ought, it is in this respect resembled to common appendant, but common appurtenant and in gross may commence either at this day by grant or be by prescription.
B WRAY, C.J., further said that in case of common for cause of vicinage the one may enclose against the other, for he who has such common cannot put his cattle into the land of the other. He ought to put them in the land where he has common, and, if they estray into the other land, they are excused of trespass by reason of the ancient usage which the law allows to avoid suits which would arise if actions should be brought for every such trespass when no separation or enclosure
C is between the commons. Therefore, he said that one may enclose against the other for cessante causa cessat effectus.

It was resolved without any difficulty that when the plaintiff's cattle came into the defendant's land and did him trespass, the defendant with a little dog might chase them out, and should not be compelled to distrain them damage feasant. Note, reader, according to the opinion of WRAY, C.J., it was lately adjudged in the
D King's Bench [in an action of *Smith* v. *How and Redman* (2)], where the case was that two lords of two several manors had two wastes adjoining (parcels of their manors joining) without enclosure or separation and yet the bounds of each manor was well known by certain bounds and marks, in which wastes the tenants of the one manor and of the other had reciprocally common for cause of vicinage, in that case one may enclose against and thereby utterly toll the common for cause of
E vicinage, against which two objections were made. (i) Because it had been used by prescription from time whereof, etc., the beginning of which cannot be known, it would be hard now to break that which has had such continuance, for, as it is said, obtemperandum est consuetudini rationabili tanquam legi: (ii) perhaps the waste of one was greater or of greater value than the other, and probably those who had the less at the beginning gave recompense to have his common in the greater,
F and, therefore, it would be now unreasonable to undo or defeat it. As to these it was answered and resolved that the prescription imports the reciprocal cause in itself, sc., for cause of vicinage, and no other cause can be imagined, and forasmuch as it is potius an excuse of trespass when the cattle of the tenants of the one manor stray into the waste of the other manor than any certain inheritance, for it was resolved clearly that the tenants of the one manor could not put their beasts
G into the wastes of the other manor, but they should come there only by escape, and that the enclosure is only to prevent the escape of the cattle (which is a lawful act). For these reasons it was adjudged that the one might enclose against the other.

Note, reader, it is true that agriculture and tillage is greatly respected and favoured as well by the common law, as by the common assent of the King, Lords
H Spiritual and Temporal, and all the Commons, in many Parliaments. The common law prefers arable land before all other, and, therefore, for its dignity it ought to be named in a præcipe before meadow, pasture, wood, or any other soil, and it appears by the statute 4 Henry 7, c. 19 [Tillage Act, 1488: rep. 1624] that six inconveniences are introduced by subversion or conversion of arable land into pasture, tending to two deplorable consequences. (i) The first inconvenience is the
I increase of idleness, the root and cause of all mischiefs; (ii) depopulation and decrease of populous towns, and maintenance only of two or three herdsmen, who keep beasts, in lieu of great numbers of strong and able men; (iii) Churches for want of inhabitants run to ruin, and are destroyed; (iv) The service of God neglected; (v) injury and wrong done to patrons and curates; (vi) the defence of the land for want of men strong and enured to labour against foreign enemies, weakened and impaired. The two consequences are that these inconveniences tend (i) to the great displeasure of God; (ii) to the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to

be one of the greatest commodities of this realm. . . . But I have observed that the A
most excellent policy, and assured means to increase and advance agriculture is to provide that corn shall be of a reasonable and competent value, for make what statutes you please, if the ploughman has not a competent profit for his excessive labour and great charge, he will not employ his labour and charge without a reasonable gain to support himself and his poor family.

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